To: Timothy Fisher[tjfisher@blm.gov]; Rachel Wootton[rwootton@blm.gov]
From: Ginn, Allison
Sent: 2017-06-01T15:58:37-04:00
Importance: Normal
Subject: GSENM - Zip Folder
Received: 2017-06-01T15:59:11-04:00
5-19-17 Follow Up Response GSENM_1.zip

For re-uploading ease.

Regards,

Allison Ginn
National Conservation Lands Program Lead
BLM Utah State Office
801-539-4053

Quiet Title Act Lawsuits – Utah State and County R.S. 2477 Claims
12,240 Roads as Identified in Amended Complaints Filed/Served

March 2014

Beaver	2:12-cv-00423-CW	May 2012	454 roads	
Box Elder	2:12-cv-00105-DB	May 2012	191 roads	
Carbon 1	2:11-cv-01043-PMW	November 2011	33 roads	
Carbon 2	2:12-cv-00427-DB	May 2012	71 roads	[duplicates above 33 roads]
Daggett	2:12-cv-00447-DN	May 2012	56 roads	
Duchesne	2:12-cv-00425-CW	May 2012	70 roads	
Emery 1	2:05-cv-00540-DB	June 2005	7 roads	
Emery 2	2:12-cv-00429-CW	May 2012	299 roads	
Garfield 1	2:11-cv-01045-DN	November 2011	95 roads	
Garfield 2	2:12-cv-00478-TC	May 2012	640 roads	[consolidated with Garfield 1]
Grand	2:12-cv-00466-DN	May 2012	754 roads	
Iron	2:12-cv-00472-BSJ	May 2012	1421 roads	
Juab 1	2:05-cv-00714-TC	December 2005	3 roads	[settlement, Consent Decree]
Juab 2	2:12-cv-00462-DS	May 2012	661 roads	
Juab 3	2:12-cv-00584-TC	June 2012	11 roads	
Kane 1	2:08-cv-00315-CW	April 2008	15 roads	[appeals to 10th Circuit]
Kane 2	2:10-cv-01073-RJS	February 2011	64 roads	
Kane 3	2:11-cv-01031-DB	November 2011	710 roads	[consolidated with Kane 2]
Kane 4	2:12-cv-00476-DB	May 2012	1 road	[consolidated with Kane 3]
Millard	2:12-cv-00451-DB	May 2012	709 roads	
Piute	2:12-cv-00428-CW	May 2012	99 roads	
Rich	2:12-cv-00424-DN	May 2012	219 roads	
San Juan	2:12-cv-00467-DAK	May 2012	1703 roads	
Sanpete	2:12-cv-00430-DB	May 2012	261 roads	
Sevier	2:12-cv-00452-DN	May 2012	657 roads	

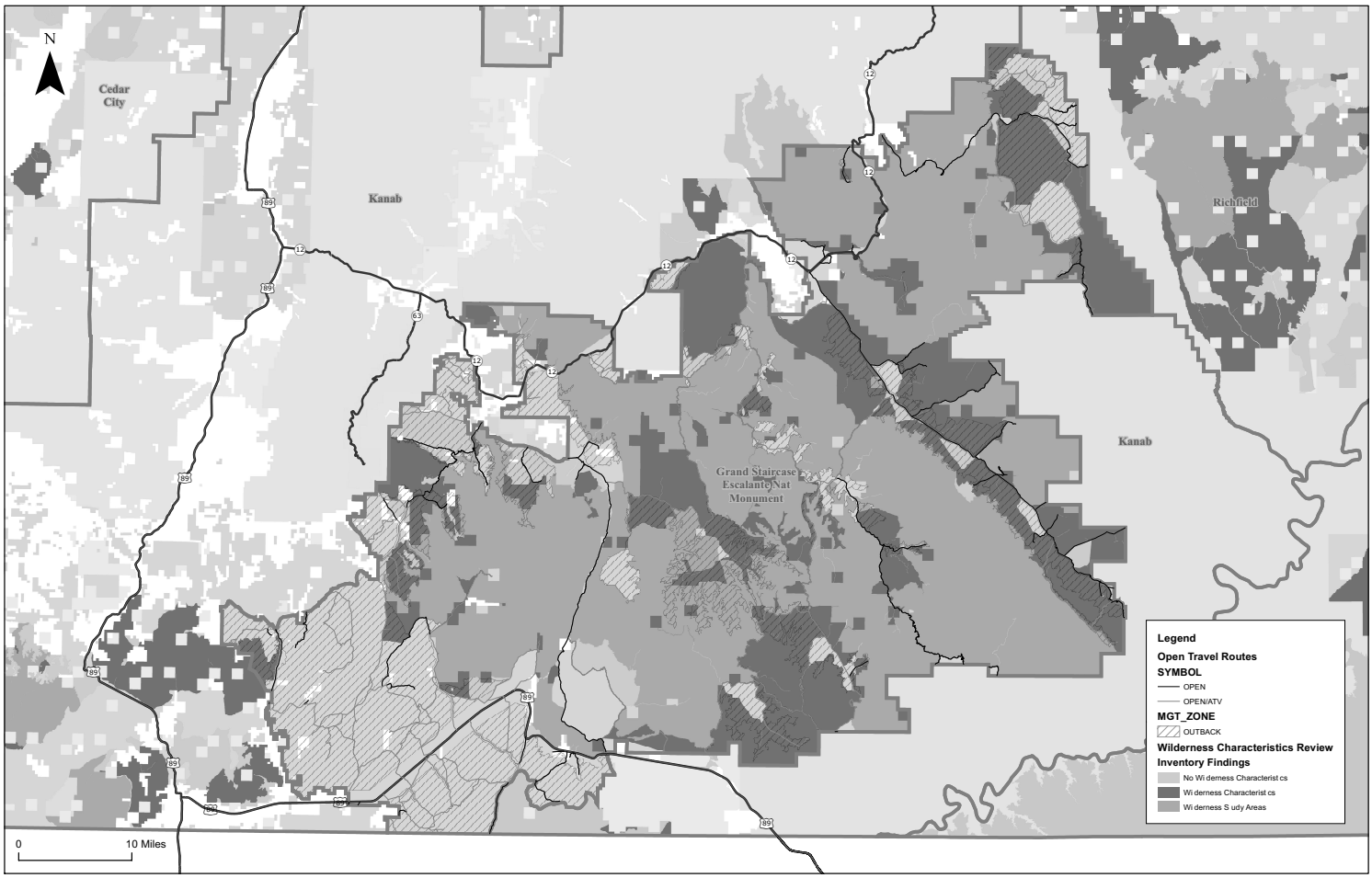
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Tooele	2:12-cv-00477-CW	May 2012	692 roads
Uintah	2:12-cv-00461-DAK	May 2012	1615 roads
Utah	2:12-cv-00426-CW	May 2012	39 roads
Washington	2:12-cv-00471-TC	May 2012	426 roads
Wayne	2:12-cv-00434-DN	May 2012	297 roads

The active cases going forward at this time are Kane 2/3/4 and Garfield 1/2.

There are no R.S. 2477 road claims in the following Utah counties:

Cache
Davis
Morgan
Salt Lake
Summit
Weber
Wasatch


N
Cedar City
Kanab
Richfield
Kanab
Grand Staircase Escalante Nat Monument
0
10 Miles
Legend
Open Travel Routes
SYMBOL
OPEN
OPEN/ATV
MGT_ZONE
OUTBACK
Wilderness Characteristics Review Inventory Findings
No Wilderness Characteristics
Wilderness Characteristics
Wilderness Study Areas

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Paleontological research began in earnest on the Kaiparowits Plateau (in the core of the Grand Staircase-Escalante National Monument) in 1983 when Jeffrey Eaton (then a Ph.D. candidate at the University of Colorado) and Dr. Richard Cifelli (then at the Museum of Northern Arizona) initiated research largely centered around the study of small vertebrates like mammals (all Cretaceous mammals were relatively small). Initial interest in the Kaiparowits Plateau region was the result of its having a relatively continuous record of terrestrial evolution that was 20 million years long (about 95-75 million years ago) during the Cretaceous period (see Eaton, 1991). It was quickly discovered that many of the units were fossiliferous and since 1983 significant vertebrate fossils have been found in every terrestrial unit in the sequence. This is the most continuous record of terrestrial evolution during this interval known in the world.

The remains of mammals, frogs, salamanders, lizards, fish, turtles, crocodiles, and dinosaurs have all been recovered painting an especially complete picture of these important ancient ecosystems. Although original work was focused on small vertebrates, quickly other researchers (e.g. Dr. David Gillette, Museum of Northern Arizona; Dr. Scott Sampson with his students and other colleagues, Natural History Museum of Utah; Dr. Randy Irmis, Natural History Museum of Utah; Dr. Alan Titus, Grand Staircase-Escalante National Monument; Dr. Joseph Sertich, Denver Museum of Nature and Science; etc.) have brought focus on larger vertebrates such as dinosaurs. The results have been remarkable. The Kaiparowits region has produced an enormous number of taxa that are new to science and has significantly changed our understanding of terrestrial evolution during the Cretaceous. Even the one significant marine unit, the Tropic Shale, has become famous for its remarkable plesiosaurs (enormous marine reptiles) and the oldest known mosasaur in North America. There is no question that the Kaiparowits region contains a world class treasure trove of fossils, and that area will continue to produce new treasures for decades to come as only about 20% of its total area has been explored.

The attached map of GSENM summarizes its fossil resources. In particular, the Kaiparowits Plateau contains remarkable localities in all of the Cretaceous units (Naturita, Tropic Shale, Straight Cliffs, Wahweap, and Kaiparowits formations) while the southern portion of the plateau has excellent localities in the Naturita, Tropic Shale and Straight Cliffs Formations (the stratigraphically higher formations, the Wahweap and Kaiparowits, have been largely removed by erosion). Over 45 new taxa and more than 300 taxa total have been reported from these areas (see Eaton and Cifelli, 2013; Titus et al., 2016). The collections are represented by tens of thousands of specimens housed at the Natural History Museum of Utah, Oklahoma Museum of Natural History, Denver Museum of Nature and Science, Museum of Northern Arizona; University of Colorado Museum and others.

Many of the larger fossils, such as turtles, crocodiles, and dinosaurs, are subject to amateur collecting and inadvertent destruction by ATV activity, etc. We have lost specimens to amateur collecting prior to designation of the monument (this is also true of archeological areas that were looted) and are aware of many cases of destruction by off road activities. The monument has greatly improved the protection of resources and has also helped to coordinate and regulate the large number of scientist working there thus improving the quality of the science and making it more integrative.

References

Eaton, J. G., 1991, Biostratigraphic framework for Upper Cretaceous rocks of the Kaiparowits Plateau, southern Utah: *in* Nations, J.D., and Eaton, J.G. eds., Stratigraphy, depositional

DOI-2019-06 02217

environments, and sedimentary tectonics of the western margin, Cretaceous Western Interior Seaway: Geological Society of America Special Paper 260, p. 47-63.

Eaton, J.G., and Cifelli, R.L., 2013, Review of Late Cretaceous Mammalian Faunas of the Kaiparowits and Paunsaugunt Plateaus, Southwestern Utah, Chapter 14 *in* Titus, A. L., and Loewen, M. A. eds. At the Top of the Grand Staircase – the Late Cretaceous of Southern Utah. Indiana University Press, Bloomington, p. 319-328.

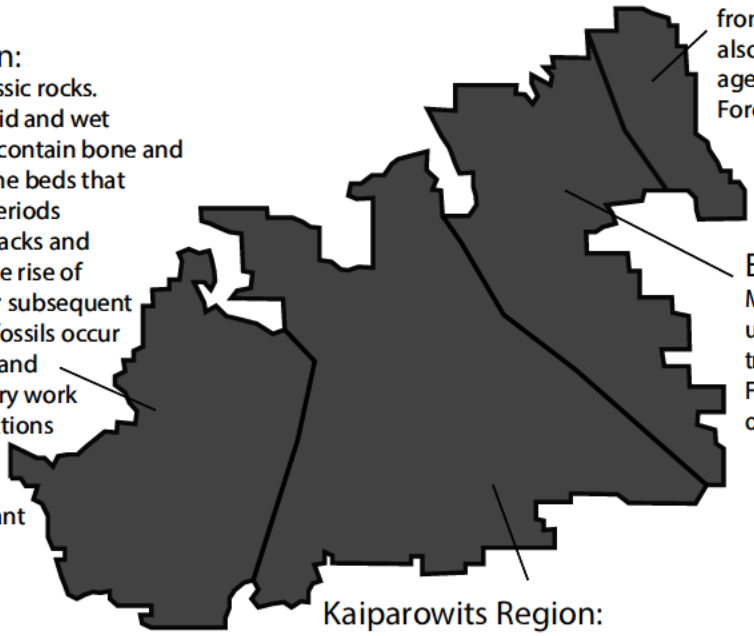
Titus, A., Eaton, J. G., and Sertich, J., 2016, Late Cretaceous stratigraphy and faunas of the Markagunt, Paunsaugunt, and Kaiparowits plateaus, southern Utah: Geology of the Intermountain West, v. 3, p. 229-291.

FOIA001:01708398

Fossil Resources of Grand Staircase-Escalante National Monument

Grand Staircase Region:

Mostly Permian through Jurassic rocks. Units represent alternating arid and wet period deposits. Wet periods contain bone and wood fossils, with some marine beds that contain fossil seashells. Dry periods preserved mostly dinosaur tracks and rare bones. Tell the story of the rise of dinosaurs in Pangea and their subsequent dominance. Most significant fossils occur in Chinle, Moenave, Kayenta, and Navajo formations. Preliminary work by Yale led to extensive collections of Chinle fossils, most of which has never been published. Fish fossils abundant in Moenave. Petrified wood abundant in the Chinle and Moenave.



Circle Cliffs Region:

Largely Permian and Triassic rocks. Many important specimens collected from the Chinle Formation, which also hosts the second largest Triassic age petrified forest outside of Petrified Forest National Monument in Arizona.

Escalante Desert Region:

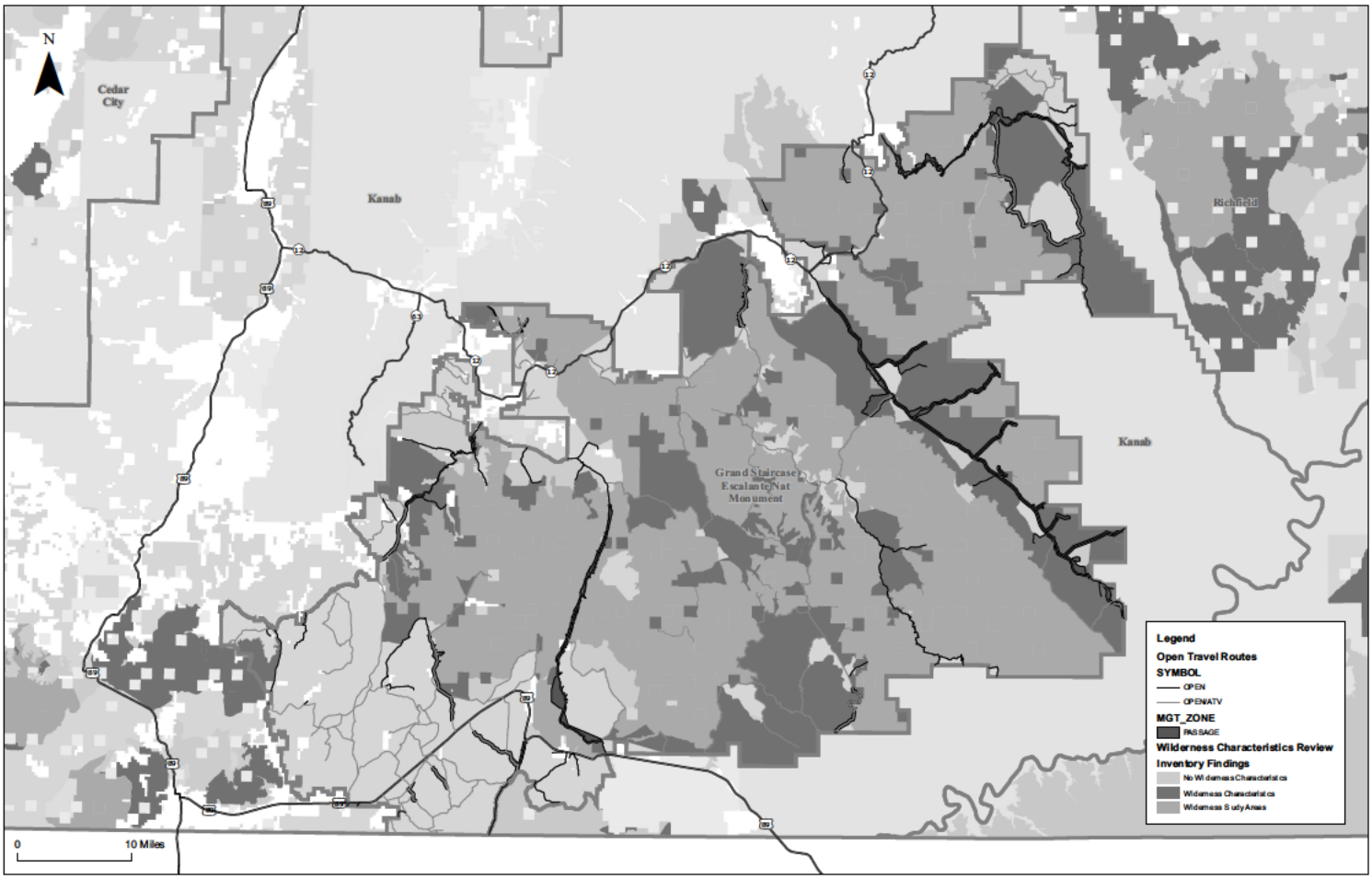
Mostly Jurassic rocks. Early and Middle units from the period have mostly track fossils. The Late Jurassic Morrison Formation contains important deposits of petrified wood and dinosaur bone.

Kaiparowits Region:

Mostly Late Cretaceous rocks dating between 100 million and 70 million years ago. Rocks record wet, tropical conditions that teemed with life. Most complete succession of terrestrial vertebrate fossils known in North America, possibly the world. Extremely high scientific significance. Hundreds of fossil species documented by thousands of specimens from thousands of localities. Dinosaur fossils abundant. Twelve new species named since Monument established. At least that many more confirmed as new but yet to be named. Only about 20% of the region has been inventoried, with emphasis along roads and other easily accessible areas.

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Positive
As of: Jan 20, 2017

UTAH ASSOCIATION OF COUNTIES, on behalf of its members, Plaintiffs, vs. GEORGE W. BUSH, in his official capacity as PRESIDENT OF THE UNITED STATES, et al., Defendants. and SOUTHERN UTAH WILDERNESS ALLIANCE, et al., Defendants-Intervenors. MOUNTAIN STATES LEGAL FOUNDATION, on behalf of its members, Plaintiffs, vs. GEORGE W. BUSH, in his official capacity as PRESIDENT OF THE UNITED STATES, et al., Defendants. and SOUTHERN UTAH WILDERNESS ALLIANCE, et al., Defendants-Intervenors.

Case No. 2:97CV0479, 2:97CV0863

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

316 F. Supp. 2d 1172*; *2004 U.S. Dist. LEXIS 9865*; *11 A.L.R. Fed. 2d 917

April 19, 2004, Decided

SUBSEQUENT HISTORY: Appeal dismissed by *Utah Ass'n of Counties v. Bush, 455 F.3d 1094, 2006 U.S. App. LEXIS 18547 (10th Cir. Utah, July 24, 2006)*

PRIOR HISTORY: *Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 2001 U.S. App. LEXIS 15533 (10th Cir. Utah, 2001)*

DISPOSITION: [**1] Defendants' Motion to Dismiss and in the alternative motion for Summary Judgment GRANTED; plaintiffs' Motions for Summary Judgment DENIED in their entirety.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff counties and others sued defendant United States President and various federal agencies and officials, alleging that the Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433* violated the delegation doctrine, that creation of the Grand Staircase Monument was ultra vires and violated the Property and Spending Clauses, and various federal laws. Defendants moved to dismiss or for summary judgment. Plaintiffs moved for summary judgment.

OVERVIEW: The case concerned the designation of 1.7 million acres of federal land as a national monument pursuant to the Antiquities Act. Inter alia, the court held that the President complied with the Antiquities Act by (1) designating, in his discretion, objects of scientific or historic value, and (2) setting aside, in his discretion, the smallest area necessary to protect the objects. These facts compelled a finding in favor of the President's actions. Supreme Court precedent instructed that judicial review

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in these circumstances was at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the court was not permitted to go. The Antiquities Act's virtually unlimited grant of discretion to the President was a proper constitutional grant of authority and stood as valid law. Claims based on other federal acts were of no merit because the statutes did not provide for a private right of action and the Administrative Procedure Act required, in such cases, a finding of final agency action. The President was not an agency, and the other defendants were only assisting the President in the execution of his discretion.

OUTCOME: The court granted defendants' motion to dismiss or for summary judgment.

LexisNexis(R) Headnotes

Governments > Federal Government > Property
Real Property Law > Zoning & Land Use > Historic Preservation
[HN1] The Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, gives the President of the United States authority to create national monuments. The Antiquities Act authorizes the President, "in his discretion," to establish as national monuments objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States. The Act requires the president to reserve land confined to the smallest area compatible with the proper care and management of the objects to be protected.

Real Property Law > Zoning & Land Use > Historic Preservation
[HN2] See *16 U.S.C.S. § 431*.

Energy & Utilities Law > Mining Industry > Mineral Leases > General Overview
Governments > Federal Government > Property
Real Property Law > Zoning & Land Use > Comprehensive Plans
[HN3] The Wilderness Act, *16 U.S.C.S. §§ 1131 36*, directed the Secretary of Agriculture and the Secretary of the Interior to review certain lands within their jurisdictions and make recommendations as to their suitability for wilderness classification. *16 U.S.C.S. § 1132(d)(1)*. The areas to be studied were identified as Wilderness Study Areas (WSAs). *16 U.S.C.S. § 1131*. Once the lands were inventoried, BLM was to conduct a study of each WSA, pursuant to § 603 , *43 U.S.C.S. § 1782*, of Federal Land Policy and Management Act (FLPMA), *43 U.S.C.S. § 1701 et seq*. The Bureau of Land Management would then make a recommendation to the President, who in turn would recommend to Congress whether any of the WSAs should be designated as wilderness. Until such designation occurs, the administering agency is to manage the WSAs so as not to impair their suitability for possible wilderness classification by Congress. *16 U.S.C.S. § 1133*. Once an area receives actual wilderness status, commercial enterprises, roads, motorized equipment, mining, and oil and gas leasing are prohibited in the wilderness area.

Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices
[HN4] When the President is given such a broad grant of discretion as in the Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, the courts have no authority to determine whether the President abused his discretion. To do so would impermissibly replace the President's discretion with that of the judiciary.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Environmental Law > Natural Resources & Public Lands > Federal Land Management
Real Property Law > Zoning & Land Use > Comprehensive Plans
[HN5] A federal district court has the authority to review whether the President's actions violated the United States Constitution or another federal statute, such as the Wilderness Act, *16 U.S.C.S. §§ 1131 36*.

Administrative Law > Separation of Powers > Legislative Controls > General Overview
Constitutional Law > Congressional Duties & Powers > Spending & Taxation
Constitutional Law > Relations Among Governments > New States & Federal Territory
[HN6] According to the United States District Court for the District of Utah, Central Division, Congress clearly

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had the authority to pass the Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*. It is a proper constitutional grant of authority to the President. The Act itself, and the President's designations pursuant to the Act, are not inconsistent with the *Constitution's Property Clause*, Spending Clause, or the delegation doctrine; nor is the President's Proclamation in violation of the Wilderness Act or any other federal statute. No statute passed after the Antiquities Act has repealed or amended the Antiquities Act. It stands as valid law. Only Congress has the power to change or revoke the Antiquities Act's grant of virtually unlimited discretion to the President.

Governments > Federal Government > Executive Offices
Real Property Law > Zoning & Land Use > Historic Preservation
[HN7] Exec. Order No. 10355, adopted by the Executive Branch in 1952, did not eliminate the President's withdrawal authority under the Antiquities Act.

Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices
[HN8] The President has no law making authority. The use of executive orders may be employed by the President in carrying out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials, but an executive order cannot impose legal requirements on the executive branch that are inconsistent with the express will of Congress.

Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices
[HN9] Executive Order 10355 by its express terms does not eliminate the President's authority, as granted specifically to the President by Congress. Furthermore, by specifically exempting the Antiquities Act from the reach of Federal Land Policy and Management Act (FLPMA), *43 U.S.C.S. § 1701 et seq.*, for example, Congress reaffirmed that the Antiquities Act was to continue to not be subjected to requirements that must be followed by lower level executive officials. Whatever else may by said about the possible reach of Executive Order 10355, it is undisputed that since its passage in 1952 there have been 20 presidential proclamations creating national monuments and none have transferred the exercise of withdrawal authority to the Secretary of the Interior.

Civil Procedure > U.S. Supreme Court Review > General Overview
Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices
[HN10] While there has been some debate among the United States Supreme Court justices as to whether judicial review of executive actions by the President are subject to judicial review at all, recent judgments have indicated the Court's willingness to engage in a narrowly circumscribed form of judicial review.

Administrative Law > Judicial Review > Reviewability > Preclusion
Constitutional Law > The Judiciary > Jurisdiction > General Overview
Constitutional Law > Separation of Powers
[HN11] Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. For the judiciary to probe the reasoning which underlies the exercise of such discretion would amount to a clear invasion of the legislative and executive domains.

Administrative Law > Judicial Review > Reviewability > Preclusion
Constitutional Law > The Judiciary > Jurisdiction > General Overview
Constitutional Law > Separation of Powers
[HN12] A grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether: Where a claim concerns not a want of Presidential power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

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Constitutional Law > The Judiciary > Jurisdiction > General Overview
Constitutional Law > Separation of Powers
Governments > Federal Government > Executive Offices
[HN13] Although judicial review is not available to assess a particular exercise of presidential discretion, a court may ensure that a president was in fact exercising the authority conferred by the act at issue.

Governments > Federal Government > Property
Real Property Law > Zoning & Land Use > Historic Preservation
[HN14] See *16 U.S.C.S. § 431*.

Real Property Law > Zoning & Land Use > Historic Preservation
[HN15] The plain language of the Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, empowers the President to set aside objects of historic or scientific interest. *16 U.S.C.S. § 431*. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection.

Governments > Legislation > Interpretation
Real Property Law > Zoning & Land Use > Historic Preservation
[HN16] A court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous. The "strong presumption" that the plain language of the statute expresses congressional intent is rebutted only in "rare and exceptional circumstances," when a contrary legislative intent is clearly expressed.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Administrative Law > Judicial Review > Reviewability > Standing
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN17] The National Environmental Policy Act (NEPA), *42 U.S.C.S. § 4332 et seq.*, supplies no private right of action. If an agency to which NEPA applies has violated its requirements, an aggrieved party must bring its complaint within the mechanism supplied by the Administrative Procedure Act (APA). The APA permits judicial review of final agency action for which there is no other adequate remedy in a court. *5 U.S.C.S. § 704*. In order for a violation of NEPA to be redressable at law, therefore, the violation of which a plaintiff complains must form an element of a final agency action subject to judicial review under the APA.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN18] In order for an agency's action to have that degree of finality that is amenable to judicial review under the Administrative Procedure Act, it must have some immediate effect beyond that of a recommendation: the action is final agency action only when the agency's action itself has a direct effect on the day to day business of the persons or entities affected by the action.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Constitutional Law > Congressional Duties & Powers > Census > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN19] That an agency is incapable of taking "final agency action" in a particular set of circumstances can serve to insulate the agency's preliminary actions resulting in final presidential action from judicial review under the Administrative Procedure Act.

Administrative Law > Judicial Review > Reviewability > Factual Determinations
Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN20] Central to the determination whether there exists final agency action subject to review under the Administrative Procedure Act (Administrative Procedure Act) is the question whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties. When the statute does not permit the agency to act alone, but rather requires presidential action before there is any

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direct effect on the parties, there is no determinate agency action to challenge until the President acts. Even when the presidential action authorized by statute permits the exercise of only limited discretion, and the President will almost certainly rely quite heavily on agency recommendations, the fact that presidential action is required before there will be any effect eliminates the prospect of judicial review under the APA.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

[HN21] The United States Supreme Court summarily dismisses the possibility that the President is an agency within the meaning of the Administrative Procedure Act (APA). Although the definition of agency in the APA does not explicitly exclude the President, textual silence is not enough to subject the President to the provisions of the APA. It would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

Administrative Law > Judicial Review > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
Governments > Courts > Authority to Adjudicate

[HN22] Flaws in an agency process leading to a recommendation to the President, that in turn leads to presidential action, do not convert the action of the agency, or that of the President, into action subject to judicial review under the Administrative Procedure Act(Administrative Procedure Act), since the recommendation does not constitute final agency action.

Administrative Law > Judicial Review > Reviewability > Preclusion
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
Governments > Courts > Authority to Adjudicate

[HN23] That an agency's process may have been flawed is not only irrelevant for purposes of review under the Administrative Procedure Act (Administrative Procedure Act), it is also powerless to transform a presidential action based on a flawed agency recommendation into a violation of a statute conferring presidential discretion. Although judicial review might be available outside the APA for some claims that a President exceeded the authority given by some statutes, longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President. While some agency processes leading to presidential action are insulated from judicial review by the combination of an absence of final agency action and a grant of discretion to the President, the court best fulfils its own constitutional mandate by withholding judicial relief where Congress has permissibly foreclosed it.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Administrative Law > Judicial Review > Reviewability > Preclusion
Governments > Courts > Authority to Adjudicate

[HN24] Confronted by a statute expressly conferring discretion on the President, according to the United States District Court for the District of Utah, Central Division, how the President chooses to exercise the discretion Congress has granted him is not a matter for judicial review.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Governments > Courts > Authority to Adjudicate

[HN25] As the Administrative Procedure Act does not expressly allow review of the President's actions, the court must presume that his actions are not subject to its requirements; although the President's actions may still be reviewed for constitutionality.

Administrative Law > Separation of Powers > Legislative Controls > General Overview
Constitutional Law > Relations Among Governments > New States & Federal Territory
Governments > Federal Government > U.S. Congress

[HN26] While it is true that Congress has the express authority under the *Constitution's Property Clause* to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, it is equally true that Congress may delegate this authority as it deems appropriate, and any delegation is constitutionally permissible if Congress provides standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed.

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Constitutional Law > Congressional Duties & Powers > General Overview
Constitutional Law > Relations Among Governments > New States & Federal Territory
Governments > Federal Government > U.S. Congress
[HN27] The Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, sets forth clear standards and limitations. The Act describes the types of objects that can be included in national monuments and a limitation on the size of monuments. *16 U.S.C.S. § 431*. Although the standards are general, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. Accordingly, the non delegation doctrine is not violated, nor is the *Property Clause*, which has repeatedly been construed as allowing Congress to delegate its authority to the executive and judicial branches, including the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. *U.S. Const. Art. IV, § 3, cl. 2*.

Governments > Federal Government > Executive Offices
Governments > Federal Government > Property
Real Property Law > Zoning & Land Use > Historic Preservation
[HN28] The Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, requires the President to reserve objects of historic or scientific interest that are situated upon lands owned or controlled by the government of the United States. *16 U.S.C.S. § 431*.

Governments > Federal Government > Property
Real Property Law > Zoning & Land Use > Historic Preservation
Real Property Law > Zoning & Land Use > State & Regional Planning
[HN29] The fact that some of the acreage within the boundaries of a national monument is classified as Wilderness Study Areas does not preclude its inclusion in a national monument.

Administrative Law > Judicial Review > Reviewability > Standing
Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview
[HN30] When bringing a lawsuit for violation of statutory law parties must either find language in the statute itself which allows a private right of action, or demonstrate the occurrence of final agency action, which invokes the court's authority to review the claim under the Administrative Procedure Act. If parties fail to meet these requirements they are precluded from challenging the alleged statutory violation.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Administrative Law > Separation of Powers > Constitutional Controls > Nondelegation Doctrine
Administrative Law > Separation of Powers > Executive Controls
[HN31] The Supreme Court of the United States has declared that the President is not an agency and cannot be defined as such under the Administrative Procedure Act. It follows that actions taken by the President pursuant to congressionally delegated authority cannot be considered final agency action.

Governments > Federal Government > Executive Offices
Governments > Public Lands > General Overview
Real Property Law > Ownership & Transfer > Public Entities
[HN32] Exec. Order No. 10355, issued by President Harry S. Truman in 1952, delegated to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910 (the Pickett Act), and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States for public purposes. *17 Fed. Reg. 4831 (May 26, 1952)*. The Secretary of the Interior was also authorized to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made. The Order further directed that all orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted to the Division of the Federal Register for filing and for publication in the Federal Register.

Administrative Law > Separation of Powers > Executive Controls
Governments > Federal Government > Executive Offices

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[HN33] *3 U.S.C.S. § 301* states that the President may delegate any function which is vested in the President by law to an agency or department head. It also states that nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. *3 U.S.C.S. § 301*. The President must publish such authorization in the Federal Register, but he may place terms, conditions, and limitations on the use of the delegated authority, and he may revoke the delegation "in whole or in part" at any time.

Governments > Federal Government > Executive Offices

[HN34] U.S.C.S. *§ 301* is a general authorization to delegate presidential functions.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview
Administrative Law > Separation of Powers > Executive Controls
Administrative Law > Separation of Powers > Legislative Controls > General Overview

[HN35] Administrative orders delegating authority to agency officials warrant the use of rules of construction similar to those used in statutory interpretation.

Administrative Law > Separation of Powers > Executive Controls
Governments > Legislation > Interpretation

[HN36] Courts will generally give substantial deference to the President's or the applicable department's interpretation and use of an executive order.

Administrative Law > Separation of Powers > Executive Controls
Environmental Law > Natural Resources & Public Lands > Federal Land Management
Governments > Federal Government > Property

[HN37] A President may only confer by Executive Order rights that Congress has authorized the President to confer. As the regulations implementing § 204 of Federal Land Policy and Management Act, *43 U.S.C.S. § 1701 et seq.*, recognized, Exec. Order No. 10355 conferred on the Secretary of the Interior all of the delegable authority of the President. *43 C.F.R. § 2300.0 3(a)(2)(2004)*.

Administrative Law > Separation of Powers > Legislative Controls > General Overview
Governments > Federal Government > Executive Offices
Governments > Federal Government > Property

[HN38] Although *3 U.S.C.S. § 301* authorizes the President to delegate any function which is vested in him by law to a department or agency head in the executive branch, delegation of the authority to designate national monuments seems inconsistent with the Antiquities Act itself. The Antiquities Act provides that the President is authorized, in his discretion, to designate national monuments. *16 U.S.C.S. § 431*. Because Congress only authorized the withdrawal of land for national monuments to be done in the President's discretion, it follows that the President is the only individual who can exercise this authority because only the President can exercise his own discretion. Discretion is defined as a public official's power or right to act in certain circumstances according to personal judgment and conscience. It is illogical to believe that the President can delegate his personal judgment and conscience to another.

Environmental Law > Natural Resources & Public Lands > Federal Land Management
Real Property Law > Zoning & Land Use > Historic Preservation

[HN39] Although Federal Land Policy and Management Act (FLPMA), *43 U.S.C.S. § 1701 et seq.*, imposes numerous requirements on the Secretary of the Interior when withdrawing land, the Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, was specifically exempted from the reach of FLPMA.

Governments > Federal Government > Property
Governments > Public Lands > General Overview
Real Property Law > Zoning & Land Use > Historic Preservation

[HN40] The Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, authorizes the President in his discretion to declare objects that have scientific interest, and are situated upon the public lands, to be national monuments. The Act authorizes only the President to declare these reservations and apparently this authority cannot be delegated.

Governments > Legislation > Expirations, Repeals &

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Suspensions
Governments > Legislation > Interpretation
[HN41] The test used to determine whether a statute has been repealed is also used for an executive order. A repeal may be explicit or implicit, and the ultimate question is whether repeal of the prior statute or order was intended.

Administrative Law > Separation of Powers > Executive Controls
Governments > Federal Government > Property
[HN42] Any delegation of authority pursuant to *3 U.S.C.S § 301* is revocable at any time by the President in whole or in part.

Environmental Law > Natural Resources & Public Lands > Federal Land Management
Governments > Legislation > Expirations, Repeals & Suspensions
Governments > Public Lands > General Overview
[HN43] The Federal Land Policy and Management Act (FLPMA), *43 U.S.C.S. § 1701 et seq.*, and its regulations indicate that Congress intended to repeal any delegation authority to designate national monuments to the Secretary of the Interior. Through FLPMA, Congress specifically repealed the Pickett Act, the Midwest Oil doctrine and other Acts granting withdrawal authority to the President, thereby extinguishing Presidential authority to withdraw public lands in many circumstances. As a result, Congress also revoked any delegations of authority to other members of the Executive Branch related to the repeal of that authority. Notably, FLPMA specifically excludes the Antiquities Act of 1906, *16 U.S.C.S. §§ 431 433*, from its reach and reaffirms the President's authority to designate national monuments. The Secretary of the Interior does not have authority to modify or revoke any withdrawal creating national monuments under the Antiquities Act. *43 C.F.R. § 2300.0 3(a)(1)(iii)*. Although the regulations go on to state that, by virtue of Exec. Order No. . 10355, the Secretary still possesses all the delegable Presidential authority to make, modify and revoke withdrawals and reservations with respect to lands of the public domain, *43 C.F.R. § 2300.0 3(a)(2)*, it appears Congress never considered authority under the Antiquities Act as "delegable" in the first place.

Governments > Federal Government > Executive Offices
Governments > Federal Government > Property
[HN44] Generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders. Furthermore, to assert a judicially enforceable private cause of action under an executive order, a plaintiff must show (1) that the President issued the order pursuant to a statutory mandate or delegation of authority from Congress, and (2) that the Order's terms and purpose evidenced an intent on the part of the President to create a private right of action.

Governments > Federal Government > Executive Offices
Governments > Federal Government > Property
[HN45] In the context of an executive order, in the absence of an intent of to create a private right of action to enforce compliance on the face of the order, a court will not imply one.

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JUDGES: Dee Benson, United States District Judge.

OPINION BY: Dee Benson

OPINION

[*1176] **OPINION AND ORDER**

INTRODUCTION

The present matter comes before the Court on defendants' Motion to Dismiss or in the alternative for Summary Judgment and plaintiffs' Motions for Summary Judgment. The motions were argued before the Court on January 15, 2004. The Court has considered the legal briefs and oral arguments of the respective parties and enters the following Opinion and Order.

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BACKGROUND

A. THE LAWSUITS AND THEIR CONTENTIONS

On September 18, 1996, President William Jefferson Clinton, invoking his authority under the *Antiquities Act*, designated 1.7 million acres of federal land in southeastern Utah as the Grand Staircase Escalante National Monument. On June 23, 1997, the Utah Association of Counties, (UAC) filed this lawsuit challenging the President's actions, naming as defendants the United States of America, William J. Clinton in his official capacity as [**5] President of the United States, Kathleen McGinty in her official capacity as chair of the Council on Environmental Quality (CEQ), Secretary of the Interior Bruce Babbitt, the United States Department of the Interior (DOI), and Patrick Shea, Director of the Bureau of Land Management (BLM).

On November 5, 1997 Mountain States Legal Foundation (MSLF) filed a similar suit against defendants Clinton, Babbitt, and the United States of America. A month later, MSLF filed an amended complaint, which added defendant McGinty. UAC's and MSLF's cases were consolidated. [1]

1 Pursuant to *Federal Rules of Civil Procedure 25(d)(1)*, defendants have since been substituted to reflect a presidential and administration change. Current individual defendants are now President George W. Bush; CEQ Chair James L. Connaughton; Department of the Interior Secretary Gale Norton and Bureau of Land Management Director Kathleen Clarke.

Plaintiffs allege:

1) The Antiquities Act is unconstitutional because [**6] it violates the delegation doctrine. Plaintiffs claim that only Congress has the authority to withdraw such lands from the federal trust.

2) By creating the Grand Staircase Monument the President acted *ultra vires* and violated the following provisions of the United States Constitution:

a) the *Property Clause, U.S. Const., Art. IV, § 3, cl. 2*; because the authority to [*1177] manage federal lands rests exclusively with Congress; and

b) the Spending Clause, *U.S. Const., Art. I, § 8, cl. 1*; because only Congress has the authority to obligate money which will be drawn from the Treasury to purchase private property.

3) By creating the Grand Staircase Monument the President violated:

a) the Antiquities Act, *16 U.S.C. § 431*; because he failed to designate the requisite objects of historic or scientific value and he did not limit the size of the monument to the "smallest area" necessary to preserve the objects.

b) the Wilderness Act, *16 U.S.C.A. § 1131 et seq.;* because the President established as *de facto* wilderness areas within the Grand Staircase Monument, and only Congress has the authority to designate public lands as wilderness.

[**7] c) Executive Order 10355, because the President, rather than the Secretary of the Interior, withdrew the land.

4) By creating the Grand Staircase Monument the President and/or one or more of the other defendants violated:

a) the National Environmental Policy Act (NEPA), *42 U.S.C. § 4332 et seq;* because the joint activities of the Department of the Interior and CEQ were carried out independently of the President and were in fact initiated by DOI, and therefore these actions required the preparation of an Environmental Impact Statement (EIS) and compliance with other NEPA regulations, which did not happen.

b) the Federal Land Policy and Management Act (FLPMA), *43 U.S.C. § 1701 et seq.;* because the President's withdrawal of public lands did not comply with FLPMA's withdrawal, notice and land use planning provisions.

C) the Federal Advisory Committee Act (FACA), 5 U.S.C. app 2; because advice and recommendations were received by the President and other defendants from various individuals who constituted an "advisory committee" within the meaning of FACA and therefore required compliance with FACA's procedural [**8] standards.

d) The Anti Deficiency Act, *31 U.S.C. § 1341*; because an improper appropriation was created.

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Both plaintiffs seek summary judgment as to all of the above claims.

All of the defendants seek dismissal or in the alternative summary judgment as to all claims. They challenge the Court's jurisdiction to hear the case under the doctrines of standing (as to MSLF only), ripeness and lack of judicial review authority. As to the plaintiffs' claims of violations of the United States Constitution and federal statutes, the defendants seek dismissal as a matter of law.

(1) THE ANTIQUITIES ACT

[HN1] The Antiquities Act of 1906, *16 U.S.C. § 431*, gives the President authority to create national monuments. [2] Since its enactment, [*1178] presidents have used the Antiquities Act more than 100 times to withdraw lands from the public domain as national monuments. President Clinton's use of the Antiquities Act to create the Grand Staircase Monument in 1996 was the first use of the Antiquities Act in more than two decades. The Antiquities Act authorizes the President, "in his discretion," to establish as national monuments "objects of historic or scientific [**9] interest that are situated upon the lands owned or controlled by the government of the United States." *Id.* The Act requires the president to reserve land confined to the "smallest area compatible with the proper care and management of the objects to be protected." *Id.* For purposes of this litigation, it is helpful to look to the creation of the Act and how it has been used and interpreted since its creation in 1906.

2 The full text of the Act reads as follows:

> [HN2] The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.
>
> *16 U.S.C. § 431 (1976)*.

[**10] The original purpose of the proposed Act was to protect objects of antiquity. [3] The substance of the Act, developed over a period of more than six years, was created in response to the demands of archaeological organizations. Although the scope of the archaeological organizations' proposals was limited to preservation of antiquities on federal lands, the United States Department of the Interior proposed adding the protection of scenic and scientific resources to the Act. For six years Congress rejected attempts to include the Department's proposal. It appears, however, that Congress was unable to pass the limited archaeologists' bill because of bureaucratic delays and various disagreements between museums and universities seeking authority to excavate ruins on public lands. *See* Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act,* 56 Wash. L. Rev. 439, 448 (1981).

3 The phrase "objects of antiquity," while not in *§ 431* but found in *§ 433*, has commonly been interpreted to include such items as paleontological and archaeological artifacts. When interpreting its precise meaning, however, courts have disagreed with the adequacy of the phrase. *See e.g., U.S. v. Diaz, 499 F.2d 113, 114 5 (9th Cir. 1974)* (finding that the phrase "objects of antiquity" was "fatally vague in violation of the *due process clause of the Constitution*."); *but see U.S. v. Smyer,, 596 F.2d 939, 941 (10th Cir. 1979)* (holding that "when measured by common understanding and practice," the phrase was sufficiently definite to define the protected object).

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[**11] Edgar Lee Hewitt, a prominent archaeologist, drafted the bill that was finally enacted in 1906. Government officials persuaded Hewitt to broaden the scope of his draft by including the phrase "other objects of historic or scientific interest." This phrase essentially allowed the Department of the Interior's proposal, which Congress had previously rejected, to be included in the final bill. In addition, while earlier proposals had limited the reservations to 320 or at the most 640 acres, Hewitt's draft allowed the limit to be set according to "the smallest area compatible with the proper care and management of the objects to be protected." Despite the presence of this broader language, there is some support for the proposition that Congress intended to limit the creation of national monuments to small land areas surrounding specific objects. Illustrative of this intent is House Report No. 2224, which states "there are scattered throughout the southwest quite a large number of very interesting ruins ... the bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics." H.R. REP. NO. 2224, 59TH [**12] CONGRESS, 1ST SESS. at 1 (1906).

Despite what may have been the intent of some members of Congress, use of the Antiquities Act has clearly expanded beyond the protection of antiquities and [*1179] "small reservations" of "interesting ruins." Nothing in the language of the Act specifically authorizes the creation of national monuments for scenic purposes or for general conservation purposes. Nonetheless, several presidents have used the Act to withdraw large land areas for scenic and general conservation purposes. President Theodore Roosevelt was the first president to withdraw land under the Act, establishing a precedent other presidents later followed to create large scenic monuments. Within two years of enactment of the Act, President Roosevelt made eighteen withdrawals of land. [4]

4 The national monuments created by President Theodore Roosevelt:

9/24/06 Devils Tower, WY

12/8/06 El Morro, NM

12/8/06 Montezuma Castle, AZ

12/8/06 Petrified Forest, AZ

3/11/07 Chaco Canyon, NM

5/6/07 Cinder Cone, CA

5/6/07 Lassen Peak, CA

11/16/07 Gila Cliff Dwellings, NM

12/19/07 Tonto, AZ

1/9/08 Muir Woods, CA

1/11/08 Grand Canyon, AZ

1/16/08 Pinnacles, CA

2/7/08 Jewel Cave, SD

4/16/08 Natural Bridges, UT

5/11/08 Lewis and Clark Cavern, MT

9/15/08 Tumacacori, AZ

12/7/08 Wheeler, CO

3/2/09 Mount Olympus, WA

[**13] Several monuments have been created within the general vicinity of the Grand Staircase Monument. In Utah alone, there are six such national monuments: Cedar Breaks, Hovenweep, Timpanogos Cave, Dinosaur, Rainbow Bridge, and Natural Bridges. Surrounding areas in Colorado and Arizona have also been designated as monuments under the Antiquities Act. Presidential proclamations creating these monuments cited geologic, paleontologic, archaeologic, and other features similar to those in the Grand Staircase Monument proclamation. Zion National Park to the west of the Grand Staircase Monument was originally Mukuntuweap National Monument, created by President Taft in 1909 to protect its "many natural features of unusual archaeologic, geologic, and geographic interest." See Proclamation No. 877, 36 Stat. 2498. President Wilson enlarged the boundaries of the monument in 1918 and Congress converted it to a national park in 1919.

President Hoover established Utah's Arches National Monument to the northeast of the Grand Staircase Monument in 1929, citing its "unique wind worn sandstone formation, the preservation of which is desirable because of their educational and scenic value." Proclamation [**14] No. 1875, 46 Stat. 2988. Congress designated Arches a National Park in 1971. President Franklin D. Roosevelt established Utah's Cedar Breaks

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National Monument, located west of the Grand Staircase Monument, in 1933 (Proclamation No. 2054, 48 stat. 1705.), and Capital Reef National Monument, which is located to the immediate east of the Grand Staircase Monument, in 1938. (Proclamation No. 2246, 50 Stat. 1856.)

Coincidentally, during the 1930s, the Franklin D. Roosevelt administration considered the creation of a monument in virtually the same area as the Grand Staircase Monument. President Roosevelt received a recommendation to withdraw 4.4. million acres of Utah's red rock country, creating Escalante National Monument. The Roosevelt administration ultimately rejected the idea, in large part because of local opposition. *See* James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?, 70 U. COLO L. REV. 483, 488 (1999)*.

Most of the presidential withdrawals have been uncontroversial. However, there have been several legal challenges to presidential monument designations under the Antiquities Act. Every challenge to date has been unsuccessful. [**15] *See Cameron* [*1180] *v. United States, 252 U.S. 450, 64 L. Ed. 659, 40 S. Ct. 410 (1920)* (the President's designation of the Grand Canyon as a national monument was a valid use of his authority under the Antiquities Act); *Wyoming v. Franke, 58 F. Supp. 890 (D.Wyo.1945)* (the proclamation creating the Jackson Hole National Monument complied with the standards set forth in the *Antiquities Act); Cappaert v. United States, 426 U.S. 128, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976)* (presidential proclamation withdrawing the Devil's Hole tract of land and accompanying water from the public domain and combining it with the Death Valley National Monument, explicitly reserved water rights to the federal Government and constituted a valid exercise of presidential authority under the Antiquities Act); *Anaconda Copper Co. v. Andrus,* No. A79 101 (D. Alaska, 1980); *Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978)* (president not subject to requirements of National Environmental Policy Act when proclaiming national monuments under the Antiquities Act).

2. THE WILDERNESS ACT

Also relevant to the present motions is the Wilderness Act, *16 U.S.C. §§ 1131 36(1964).* [**16] The Wilderness Act, signed into law in 1964, was intended to preserve the undeveloped character of designated areas. Prior to passage of the Wilderness Act, the United States Forest Service and the United States National Park Service were the only two federal agencies with a management scheme to preserve wilderness areas. Selection and management of the lands was discretionary. Concerned that some areas were not receiving the necessary protection and perhaps that some were receiving too much, Congress created a means by which a system of wilderness could be created that would provide the appropriate safeguards and that designated Congress alone as the final arbiter of which federal lands would actually achieve status as wilderness areas. *See* Leann Foster, *Wildlands and System Values: Our Legal Accountability to Wilderness,* 22 VT. L. REV. 917, 921 22 (1998).

[HN3] The Wilderness Act directed the Secretary of Agriculture and the Secretary of the Interior to review certain lands within their jurisdictions and make recommendations as to their suitability for wilderness classification. *See id. § 1132 (d)(1)*. The areas to be studied were identified as Wilderness [**17] Study Areas (WSAs). *See id. § 1131*. Once the lands were inventoried, BLM was to conduct a study of each WSA, pursuant to Section 603 of FLPMA, *43 U.S.C. § 1782*. The BLM would then make a recommendation to the President, who in turn would recommend to Congress whether any of the WSAs should be designated as wilderness. Until such designation occurs, the administering agency is to manage the WSAs so as not to impair their suitability for possible wilderness classification by Congress. *See 16 U.S.C. § 1133*. Once an area receives actual wilderness status, commercial enterprises, roads, motorized equipment, mining, and oil and gas leasing are prohibited in the wilderness area. *See id.*

Approximately 900,000 acres, roughly one half of the acreage within the Grand Staircase Monument, are classified as WSAs and therefore preserved for suitability for possible future preservation as wilderness. Congress has not made a final determination with regard to the WSAs within the Grand Staircase Monument.

3. EVENTS LEADING TO THE GRAND STAIRCASE PROCLAMATION

From 1978 to 1991, the BLM conducted various studies which resulted in [**18] a recommendation that 1.9 million acres of WSAs in the state of Utah should receive wilderness designation. This recommendation,

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[*1181] which included some of the land now part of the Grand Staircase Monument, was forwarded by then Secretary of the Interior Manuel Lujan to President George H. W. Bush in October, 1991. The recommendation was supported by a final EIS, and more than 11 years of BLM evaluation and public involvement. However, a change in presidential administrations in 1992 ended discussion about the proposed designation.

Regarding Utah wilderness, the new Secretary of the Interior, Bruce Babbitt, disagreed with the recommendations of his predecessor, believing significantly more land should be set aside. In 1994, then BLM Director Jim Baca wrote to an environmental group stating that the 1.9 million acre wilderness recommendation made by former Interior Secretary Lujan was "off the table." However, Secretary Babbitt's ability to undertake a new wilderness study pursuant to *Section 603 of FLPMA* had expired. Nevertheless, Secretary Babbitt testified before Congress on several occasions, urging that a considerable number of additional wilderness areas should be designated in Utah. [**19] Consequently, the 104th Congress (1995 96) considered several different Utah wilderness bills, including a bill sponsored by members of Utah's congressional delegation which would designate about two million additional acres of wilderness, which was essentially the same as the previous recommendation from former Secretary Lujan. Also under consideration was a bill sponsored by Congressman Hinchey of New York and supported by national and Utah environmental groups. The Hinchey bill sought to designate 5.7 million acres of wilderness in Utah. Neither bill reached the floor of the House, and a filibuster precluded a vote in the Senate. Thereafter, Secretary Babbitt directed a second wilderness inventory, the Utah Wilderness Review, in hopes of showing that Congressman Hinchey's proposed 5.7 million acres bill warranted passage. This Utah Wilderness Review included the evaluation of the wilderness characteristics of approximately 800,000 acres of public land now part of the Grand Staircase Monument. Eventually, however, Secretary Babbitt's efforts, along with all other efforts made by those in Congress to establish wilderness in the state of Utah, were unsuccessful.

Plaintiffs contend [**20] in this litigation that the lack of success in the effort to designate additional wilderness areas in Utah was a motivating factor behind the President's decision to designate the Grand Staircase Monument. Once the proclamation was announced the affected land was preserved in much the same manner as if it had received wilderness designation.

Plaintiffs assert, and the record appears to support, that another driving force behind Secretary Babbitt's, the DOI's, and eventually the President's efforts to create the Grand Staircase Monument was to prevent the proposed Andalex Smoky Hollow coal mining operation in Kane County, Utah from coming to fruition. [5] Besides supporting Congressman Hinchey's proposed wilderness designation, which would encompass the property proposed for the Smoky Hollow Mine, Secretary Babbitt and the DOI also attacked the validity of the federal Smoky Hollow coal leases by [*1182] attempting to cancel the suspension in the interest of conservation granted to the holders of the coal leases several years earlier by the Utah BLM State Director. The suspension was originally granted to allow Andalex sufficient time to secure mining permits and complete preparation of an EIS. [**21]

> 5 The Andalex Smoky Hollow coal mine was designed as an underground mine, affecting approximately 60 acres of surface space, to be located on property that is part of the Kaiparaowits coal field. The Kaiparowits coal field is estimated by the Utah Geological Survey to contain 62.3 billion tons of coal, of which at least 11.3 billion tons could be recovered. The estimated total federal royalty payments over time from full production of Kaiparowits coal are approximately $ 20 billion, and the State of Utah and Utah counties would have been entitled to 50% of that amount under the *Mineral Leasing Act*.

From the exhibits submitted by plaintiffs, the majority of which were secured by congressional subpoena, it appears that in early 1996, efforts involving various officials within the executive branch of government began discussing the possibility of creating a national monument in Utah by way of a presidential proclamation. Internal memoranda indicate that as early as March 1996, the DOI requested that CEQ or White [**22] House officials send a letter to Secretary Babbitt under the President's signature requesting an investigation and recommendations for a Utah national monument. Plaintiffs assert that the reasoning behind the request was to enable defendants to avoid having to

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comply with NEPA and FLPMA, because the President is not a federal agency and not subject to either NEPA or FLPMA. An internal CEQ memorandum from Ms. McGinty to Todd Stern reveals even broader reasoning behind the request that the President sign a letter to be sent to Secretary Babbitt:

> the president will do the Utah event on aug 17. however, we still need to get the letter (from the President to Interior Secretary Babbitt) signed asap. the reason: under the antiquities act, we need to build a credible record that will withstand legal challenge that: (1) the president asked the secretary to look into these lands to see if they are of important scientific, cultural, or historic value; (2) the secy undertook that review and presented the results to the president; (3) the president found the review compelling and therefore exercised his authority under the antiquities act. presidential actions under this act have always [**23] been challenged, they have never been struck down, however. so, letter needs to be signed asap so that secy has what looks like a credible amount of time to do his investigation of the matter. we have opened the letter with a sentence that gives us some more room by making it clear that the president and babbitt had discussed this some time ago. [sic] (McGinty, e mail to Todd Stern, July 29, 1996).

Plaintiffs allege that no such letter was sent to Secretary Babbitt.

From March 1996 to September 18, 1996, DOI officials worked closely with CEQ Director Kathleen McGinty and others to identify the lands to include in the proclamation and the actions needed to ensure that the proclamation would survive judicial scrutiny. In August 1996, the DOI conducted a database and bibliography search to prepare a record to support the proclamation. Some of the reasons for creating Grand Staircase Monument focused on the proposed Smoky Hollow coal mine and contentions that the mine would irreversibly damage the environment and Utah's public lands. These contentions, plaintiffs allege, were contradicted by the BLM's draft EIS.

Following this history, the Proclamation itself took place on September 18, 1996, when [**24] President Clinton stood at the south rim of the Grand Canyon in Arizona and announced the establishment of the 1.7 million acre Utah monument. There was virtually no advance consultation with Utah's federal or state officials, which may explain the decision to make the announcement in Arizona. The monument created a good deal of controversy, heightened even more because the presidential election was less than 8 weeks away. In making the announcement, President Clinton emphasized his "concern[] about a large [*1183] coal mine proposed for the area" and his belief that "we shouldn't have mines that threaten our national treasures." *Remarks Announcing the Establishment of the Grand Staircase Escalate National Monument,* 32 Weekly Comp. Pres. Doc. 1785 (Sept. 23, 1996).

In the written Proclamation, President Clinton cited "geologic treasures" as the initial reason for creation of the monument. *See* Proclamation No. 6920, *61 Fed. Reg. 50,223 (1996)*. Specifically, the President noted "sedimentary rock layers ... offering a clear view to understanding the processes of the earth's formation" and "in addition to several major arches and natural bridges, vivid geological features [**25] are laid bare in narrow, serpentine canyons, where erosion has exposed sandstone and shale deposits in shades of red, maroon, chocolate, tan, gray, and white. Such diverse objects make the monument outstanding for purposes of geologic study." *Id.* Secondly, the President cited "world class paleontological sites" as grounds for the Proclamation. *Id.* According to the President, those things in need of protection consisted of "remarkable specimens of petrified wood" and "significant fossils, including marine and brackish water mollusks, turtles, crocodilians, lizards, dinosaurs, fishes, and mammals ...." *Id.* Archeological interests in "Anasazi and Fremont cultures" were also said to be "of significant scientific and historic value worthy of preservation for future study." *Id.* Finally, the President mentioned the "spectacular array of unusual and diverse soils," "cryptobiotic crusts," and the "many different vegetative communities and numerous types of endemic plants and their pollinators" as warranting protection since "most of the ecological communities contained in the monument have low resistance to, and slow recovery from, disturbance." *Id.*

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The President's Proclamation [**26] designating the monument required that the BLM prepare an approved Monument Management Plan no later than September 18, 1999. The approved Management Plan did not make the September deadline, but was finally approved on February 28, 2000. Since approval of the Monument Management Plan the BLM has been responsible for management of the Grand Staircase Monument.

4. SUMMARY OF OPINION

The record is undisputed that the President of the United States used his authority under the Antiquities Act to designate the Grand Staircase Monument. The record is also undisputed that in doing so the President complied with the Antiquities Act's two requirements, 1) designating, in his discretion, objects of scientific or historic value, and 2) setting aside, in his discretion, the smallest area necessary to protect the objects. With little additional discussion, these facts compel a finding in favor of the President's actions in creating the monument. That is essentially the end of the legal analysis. Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers [**27] under the Antiquities Act. Beyond such a facial review the Court is not permitted to go. *Dalton v. Specter, 511 U.S. 462, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994)*; *Franklin v. Massachusetts, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992)*. [HN4] When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion. See *United States v. George S. Bush & Co., Inc., 310 U.S. 371, 84 L. Ed. 1259, 60 S. Ct. 944 (1940)*. To do so would impermissibly replace the [*1184] President's discretion with that of the judiciary.

[HN5] This Court has the authority to review whether the President's actions violated the United States Constitution or another federal statute, such as the Wilderness Act. See *Franklin v. Massachusetts, 505 U.S. at 801*; see also *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952)*; *Panama Refining Co. v. Ryan, 293 U.S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (1935)*; and *Chamber of Commerce v. Reich, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1327 (D.C. Cir. 1996)*. In the present case plaintiffs' constitutional and statutory [**28] claims are without factual or legal support. [HN6] Congress clearly had the authority to pass the Antiquities Act of 1906. It is a proper constitutional grant of authority to the President. The Act itself, and the President's designations pursuant to the Act, are not inconsistent with the *Constitution's Property Clause*, Spending Clause, or the delegation doctrine; nor is the President's Proclamation in violation of the Wilderness Act or any other federal statute. No statute passed after the Antiquities Act has repealed or amended the Antiquities Act. It stands as valid law. Only Congress has the power to change or revoke the *Antiquities Act*'s grant of virtually unlimited discretion to the President.

As for plaintiffs' myriad claims based on NEPA, FLPMA, FACA and the Anti Deficiency Act, they too are of no merit. These statutes do not provide for a private right of action. The only way parties such as the plaintiffs here may complain of a violation of these statutes is through the *Administrative Procedure Act (APA)*, which requires a finding of final agency action. Here, there is no such final agency action. The President is not an agency, and the record is undisputed that the actions of [**29] the other defendants were only assisting the President in the execution of his discretion under the Antiquities Act.

Plaintiffs' claim that the President's designation of the Grand Staircase Monument violates the Wilderness Act is unavailing. Although a significant percentage of the land in the Grand Staircase Monument may qualify as wilderness under the Wilderness Act, the President did not designate wilderness; he designated a national monument. While the Antiquities Act and the Wilderness Act in certain respects may provide overlapping sources of protection, such overlap is neither novel nor illegal, and in no way renders the President's actions invalid.

[HN7] Executive Order 10355, adopted by the Executive Branch in 1952, did not eliminate the President's withdrawal authority under the Antiquities Act. [HN8] The President has no law making authority. *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 587*. The use of executive orders may be employed by the President in carrying out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials, but an executive order cannot impose legal [**30] requirements on the executive branch that are inconsistent with the express will of Congress.[HN9] Executive Order 10355 by its express terms does not

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eliminate the President's authority, as granted specifically to the President by Congress. Furthermore, by specifically exempting the Antiquities Act from the reach of FLPMA in 1976, for example, Congress reaffirmed that the Antiquities Act was to continue to not be subjected to requirements that must be followed by lower level executive officials. Whatever else may by said about the possible reach of Executive Order 10355, it is undisputed that since its passage in 1952 there have been 20 presidential proclamations creating national monuments and none have transferred the exercise of withdrawal authority to the Secretary of the Interior.

[*1185] **B. DISCUSSION**

1. JUDICIAL REVIEW [6]

6 With respect to the issue of standing to sue, the United States concedes that UAC has standing, but insists MSLF does not. The requirements for an initial showing sufficient to support standing in a case of ths nature are relatively lenient, as set forth in *Utah v. Babbitt, 137 F.3d 1193, (10th Cir. 1998)*, *Colorado Environmental Coalition v. Wenker, 353 F.3d 1221 (10thCir.2004)* and *Lujan v. Defenders of Wildlife, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)*. Given this relatively light burden at the present stage of the instant case and recognizing that many of the claims of UAC and MSLF are identical or similar, and in the interest of judicial economy the Court will not further address the standing question in this Opinion. While not expressly finding that MSLF has standing to sue, the Court will address all of the parties'claims, including those advanced solely by MSLF.

[**31] Plaintiffs seek a searching review by this court of the President's actions in creating the Grand Staircase Monument. Both plaintiffs claim the proclamation was *ultra vires* and unconstitutional. MSLF seeks a further determination that the President abused his discretion, asking in particular for a finding that the President violated the Antiquities Act by a) not properly designating objects of scientific or historic value, b) setting aside too much property, and c) using the Act for improper purposes, such as stopping a local coal mining operation and improperly creating wilderness areas. In conducting such a sweeping judicial review, the plaintiffs seek an interpretation of the Antiquities Act that requires a comprehensive examination of the Act's legislative history. The extensive judicial review sought by the plaintiffs is, however, not available in this case.

[HN10] While there has been some debate among the United States Supreme Court justices as to whether judicial review of executive actions by the President are subject to judicial review at all, [7] recent judgments have indicated the Court's willingness to engage in a narrowly circumsribed form of judicial review. This willingness [**32] does not, however, allow judicial review of sufficient scope to assist plaintiffs' cause; long standing United States Supreme Court precedent has clearly foreclosed the broad review for which plaintiffs contend:

> [HN11] "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains.

United States v. George S. Bush & Co., 310 U.S. 371, 380, 84 L. Ed. 1259, 60 S. Ct. 944 (1940) (quoting *Martin v. Mott, 25 U.S. 19, 12 Wheat. 19, 31 32, 6 L. Ed. 537 (1827))*. [HN12] A grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether:

> [*1186] Where a claim "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. [**33] This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Dalton v. Specter, 511 U.S. 462, 474, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994) (quoting *Dakota Central Telephone Co. v. South Dakota ex rel. Payne, 250 U.S. 163, 184, 63 L. Ed. 910, 39 S. Ct. 507 (1919))*.

7 Justice Scalia's concurrence in *Franklin v.*

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Massachusetts articulates the most restrictive approach possible to the question of whether judicial review of the President's actions is permissible:

> I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.

505 U.S. 788, 827, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992). In this formulation, presidential action can be reviewed by seeking an injunction against those bound to enforce a President's directive, but the possibility of direct judicial review of the President's decision, for which plaintiffs contend, is eliminated altogether as inconsistent with "the constitutional tradition of the separation of powers." *Id. at 828*.

[**34] If a Court may not review the President's judgment as to the existence of the facts on which his discretionary judgment is based, the holdings in *Dalton* and *George S. Bush* do leave open one avenue of judicial inquiry. [HN13] Although judicial review is not available to assess a particular exercise of presidential discretion, a Court may ensure that a president was in fact exercising the authority conferred by the act at issue. Thus, although this Court is without jurisdiction to second guess the reasons underlying the President's designation of a particular monument, the Court may still inquire into whether the President, when designating this Monument, acted pursuant to the Antiquities Act.

The Antiquities Act offers two principles to guide the President in making a designation under the Act:

> [HN14] The President of the United States is authorized, in his discretion, to declare by public proclamation ... objects of historic or scientific interest ... to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

[**35] *16 U.S.C. § 431*. The Proclamation of which plaintiffs complain speaks in detail of the Monument's natural and archeological resources and indicates that the designated area is the smallest consistent with the protection of those resources. The language of the Proclamation clearly indicates that the President considered the principles that Congress required him to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects.

It is evident from the language of the Proclamation that the President exercised the discretion lawfully delegated to him by Congress under the Antiquities Act, and that finding demarcates the outer limit of judicial review. Whether the President's designation best fulfilled the general congressional intention embodied in the Antiquities Act is not a matter for judicial inquiry. This Court declines plaintiffs' invitation to substitute its judgment for that of the President, particularly in an arena in which the congressional intent most clearly manifest is an intention to delegate decision making to the sound discretion [**36] of the President. [8]

> 8 Plaintiffs devote considerable space in their Memorandum in Support of their Motion for Summary Judgment to a discussion of congressional intent and the evidence for it. According to plaintiffs, the legislative history surrounding the passage of the Antiquities Act demonstrates that Congress intended the Act be used to protect man made objects only, and was not intended to be available as a means for furthering presidential environmental agendas. (Plaintiffs' Combined Memo at 17 *et seq.*) Excerpts from floor debates before the Act's passage are also enlisted to prove that the Act was only intended to allow the President to withdraw very small plots of land to protect the man made artifacts suitable for designation. *Id.* at 18. This discussion, while no doubt of interest to the historian, is irrelevant to the legal questions before the Court, since [HN15] the plain language of the Antiquities Act empowers the President to set aside "objects of historic or scientific interest."

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16 U.S.C. § 431. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection. There is no occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since [HN16] a court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous. *See Ardestani v. Immigration and Naturalization Service, 502 U.S. 129, 135, 116 L. Ed. 2d 496, 112 S. Ct. 515 (1991)* ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed") (citations omitted).

In addition to the plain language of the statute, there is plain language on which this Court may rely in several United States Supreme Court decisions upholding particular designations of natural objects as national monuments under the Antiquities Act. In *Cameron v. United States* the Court quoted from the proclamation in which President Theodore Roosevelt designated the Grand Canyon: "The Grand Canyon, as stated in the Proclamation, 'is an object of unusual scientific interest.'" *252 U.S. 450, 455, 64 L. Ed. 659, 40 S. Ct. 410 (1920)*. Far from indicating that only man made objects are suitable for designation, *Cameron* notes approvingly that the Canyon "affords an unexampled field for geologic study [and] is regarded as one of the great natural wonders." *Id. at 456*. The Court in *Cappaert v. United States* explicitly rejected the argument offered by the Plaintiffs before this Court: "Petitioners ... argue ... [that] the President may reserve federal lands only to protect archeologic sites. However, the language of the Act which authorizes the President to [designate] national monuments ... is not so limited. *426 U.S. 128, 142, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976)*. In *Cappaert* the Court upheld a designation of a pool inhabited by "a peculiar race of desert fish ... found nowhere else in the world." *Id. at 133*. The Court has also upheld a designation of islands notable for "fossils ... and ... noteworthy examples of ancient volcanism, deposition, and active sea erosion," rather than for human artifacts. *United States v. California 436 U.S. 32, 34, 56 L. Ed. 2d 94, 98 S. Ct. 1662 (1978)*.

United States v. California addresses not only the President's discretion to designate natural objects but the geographic scope of that discretion as well. Determining whether a designation had reserved only protruding rocks and islets or submerged lands and waters adjacent to them as well is "a question only of Presidential intent, not of Presidential power." *Id. at 36*. In light of this unambiguous United States Supreme Court precedent concerning the Antiquities Act, plaintiffs' reliance on legislative history is clearly misplaced, and their arguments regarding the objects and area of designation untenable.

[**37] [*1187] Even if broad judicial review of the exercise of the President's discretion is not available, plaintiffs still contend that the procedure which led to the designation fell so far afoul of the requirements of the National Environmental Policy Act (NEPA) as to warrant strip mining the Monument. Plaintiffs contend that defendants conspired to violate the requirements of NEPA by (nefariously) creating a deceptive paper trail suggesting that it was the President, rather than the DOI, who provided the impetus to create the Grand Staircase Monument. In plaintiffs' formulation of the law, the *sine qua non* of a valid exercise of the President's discretion under the Antiquities Act is that the President proposed the idea to the DOI; the source of the inspiration for the monument determines whether NEPA and the Administrative Procedures Act (APA) are invoked:

> Although Defendant Gale Norton and the Department of the Interior are required to implement NEPA, defendants correctly assert that presidential actions under the Antiquities Act are not subject to the requirements of NEPA. It is for this reason that it was essential to [*1188] Defendants to make it appear that the request for consideration [**38] of a national monument in Utah came from the President rather than originating, as it did, within the agencies.

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(Plaintiffs' Combined Memo ISO Summary Judgment and Opp. Defendants' Motions to Dismiss or for Summary Judgment) (internal citations omitted). If plaintiffs' theory were correct, its evidence that the idea for the Grand Staircase Monument did not originate with the President would be relevant and perhaps sufficient to defeat a motion for summary judgment. Plaintiffs' brief is innocent of any legal authority, however, that would connect the premises that the DOI's final actions are subject to NEPA while the President's actions under the Antiquities Act are not, with the conclusion that it is essential for the idea of a monument to have come from the President. Plaintiffs and defendants are correct that the requirements of NEPA do not apply to the exercise of presidential discretion under the Antiquities Act. To the extent that DOI takes action that could be characterized as final agency action for the purposes of the APA, Plaintiffs are also correct that the requirements of NEPA apply to DOI actions. However, plaintiffs do not cite any legal authority, nor is the Court [**39] aware of any, which suggests that these considerations affect the exercise of presidential authority pursuant to the Antiquities Act. [9] Plaintiffs err in importing a requirement of presidential inspiration into the Antiquities Act's grant of authority to the President.

> 9 Plaintiffs' best and only case for the requirement that the idea for a monument originate with the President rather than the DOI is a series of emails and letters generated by personnel within the DOI and the CEQ. (Combined Memo ISO Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Motions to Dismiss or for Summary Judgment at 37 *et seq.*) At best, Plaintiffs have demonstrated that employees within these agencies believed that the idea for the Monument should appear to originate with the President. The machinations of a few agency employees, and the motivations that animated them, however, cannot take the place of some legal authority supporting the plaintiffs' proposition that the President cannot validly exercise his authority under the Antiquities Act unless the idea for a particular monument originates with him.

[**40] Since the Antiquities Act is silent as to whether there are limitations on the sources from which the President may draw the inspiration to act, if such a limitation exists it must be found in other statutory provisions, the Constitution, or in the common law. Although Plaintiffs have directed the Court to no statutory authority to suggest that NEPA has any application to the President's actions in this case, it is reasonable to look to NEPA for the source of the requirements for which plaintiffs contend. NEPA cannot be the end of the inquiry, however, for [HN17] NEPA supplies no private right of action. *See Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)*. If an agency to which NEPA applies has violated its requirements, an aggrieved party must bring its complaint within the mechanism supplied by the APA. The APA permits judicial review of "final agency action for which there is no other adequate remedy in a court." *5 U.S.C. § 704*. In order for a violation of NEPA to be redressable at law, therefore, the violation of which a plaintiff complains must form an element of a final agency action subject to judicial review under [**41] the APA.

While the United States Supreme Court has not ruled on the precise question whether an agency's recommendation to the President that he designate a particular monument under the Antiquities Act constitutes final agency action subject to judicial review under the APA, there is good law suggesting the contrary. [HN18] In order [*1189] for an agency's action to have that degree of finality that is amenable to judicial review under the APA, it must have some immediate effect beyond that of a recommendation: the action is final agency action only when the agency's action itself "has a direct effect on the day to day business" of the persons or entities affected by the action. *Abbott Laboratories v. Gardner, 387 U.S. 136, 152, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967)*.

[HN19] That an agency is incapable of taking "final agency action" in a particular set of circumstances can serve to insulate the agency's preliminary actions (resulting in final *presidential* action) from judicial review under the APA. The United States Supreme Court, in *Franklin v. Massachusetts,* analyzed the President's role in communicating the results of the census to Congress for the purpose of reapportioning seats in the [**42] House of Representatives. *505 U.S. 788 (1992)*. The statutory scheme at issue required the Secretary of Commerce to communicate the results of the census to the President, who then transmitted those results to Congress. *2 U.S.C. §§ 2a(a);141(b)*. The fact that the statute *requires* the President to perform only ministerial

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functions, such as making apportionment calculations according to set formulae, does not transform the Secretary's action in carrying out the census into final agency action for the purposes of review under the APA. Because the statute did not require the President to use the data from the Secretary's report, and because the President is not precluded from directing the Secretary to amend or correct the report, it is the President's actions, and not those of the Secretary, that effect changes to apportionment. *Franklin, 505 U.S. at 797 9*.

[HN20] Central to the determination whether there exists final agency action subject to review under the APA is the question "whether the agency has completed its decisionrnaking process, and whether the result of that process is one that will directly affect the parties." *Id. at 797*. [**43] When the statute does not permit the agency to act alone, but rather requires presidential action before there is any direct effect on the parties, "there is no determinate agency action to challenge" until the President acts. *Id. at 799*. Even when the presidential action authorized by statute permits the exercise of only limited discretion, and the President will almost certainly rely quite heavily on agency recommendations, the fact that presidential action is required before there will be any effect eliminates the prospect of judicial review under the APA. [10]

> 10 [HN21] The Supreme Court summarily dismisses the possibility that the President is an agency within the meaning of the APA. Although the definition of agency in the APA does not explicitly exclude the President, "textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin, 505 U.S. at 800 801*.

[**44] [HN22] Flaws in an agency process leading to a recommendation to the President, that in turn leads to presidential action, do not convert the action of the agency, or that of the President, into action subject to judicial review under the APA. In *Dalton v. Specter* the United States Supreme Court reiterated the rule that a process leading to a recommendation, which the President could then choose to accept or reject, even if flawed, did not permit of judicial review pursuant to the APA, since the recommendation did not constitute final agency action. *511 U.S. 462, 469 70, 128 L. Ed. 2d 497, 114 S. Ct. 1719* ("The action that 'will directly affect' the military [*1190] bases is taken by the President ... Accordingly, the Secretary's and Commission's reports serve 'more like a tentative recommendation than a final and binding determination ... The reports are, 'like the ruling of a subordinate official, not final and therefore not subject to review'") (citations omitted).

[HN23] That an agency's process may have been flawed is not only irrelevant for purposes of review under the APA, it is also powerless to transform a presidential action based on a flawed agency recommendation into a violation of a statute conferring presidential [**45] discretion. The Court in *Dalton* conceded, *arguendo,* the proposition that judicial review might be available outside the APA for some claims that a President exceeded the authority given by some statutes, but "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President." *511 U.S. 462, 474, 128 L. Ed. 2d 497, 114 S. Ct. 1719*. While recognizing that some agency processes leading to presidential action are insulated from judicial review by the combination of an absence of final agency action and a grant of discretion to the President, the Court observed that it best fulfils its own constitutional mandate by "withholding judicial relief where Congress has permissibly foreclosed it." *Id. at 477*. [HN24] Confronted by a statute expressly conferring discretion on the President to make precisely the sort of decision he made in designating the Grand Staircase Monument, this Court must conclude that "how the President chooses to exercise the discretion Congress has granted him is not a matter for [judicial] review." *Id. at 476*.

Assuming that plaintiffs are correct, that the original idea for [**46] the Monument was entirely the creature of the DOI, the actions of the DOI had no direct and immediate impact on the plaintiffs. It was the President's action, and not the action of the DOI, that had the legal effect of creating the Monument, and the DOI's activities therefore do not constitute final agency action reviewable under the APA.

2. CONSTITUTIONAL CLAIMS

In contrast to the limited judicial review discussed above, judicial review to determine the constitutionality of a President's acts may be appropriate. See *Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)*;

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Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1944); *Franklin v. Massachusetts, 505 U.S. at 801*[HN25] ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality"). Plaintiffs raise three constitutional claims in this case. First, they assert that the Antiquities Act itself is unconstitutional in violation of the delegation doctrine. In addition they claim that even if the Antiquities Act is [**47] constitutional the manner in which it was utilized in creating the Grand Staircase Monument violated the *Property Clause* and the Spending Clause.

A. Delegation Doctrine and *Property Clause*

Plaintiffs contend that Congress violated both the delegation doctrine (or perhaps more accurately, the non delegation doctrine) and the *Property Clause* by giving the President, under the Antiquities Act, virtually unfettered discretion to regulate and make rules concerning federal property. Neither contention has merit. [HN26] While it is true that Congress has the express authority under the *Constitution's Property Clause* to "dispose of and make all needful Rules and Regulations respecting [*1191] the Territory or other Property belonging to the United States," it is equally true that Congress may delegate this authority as it deems appropriate. *Yakus v. United States, 321 U.S. 414, 88 L. Ed. 834, 64 S. Ct. 660 (1944)*, and any delegation is constitutionally permissible if Congress provides "standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed." See *Id at 425 26*. [11] [HN27] The Antiquities Act sets [**48] forth clear standards and limitations. The Act describes the types of objects that can be included in national monuments and a limitation on the size of monuments. See *16 U.S.C. § 431*. Although the standards are general, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v. United States, 500 U.S. 160, 165, 114 L. Ed. 2d 219, 111 S. Ct. 1752 (1991)*. Accordingly, the non delegation doctrine is not violated, nor is the *Property Clause*, which has repeatedly been construed as allowing Congress to delegate its authority to the executive and judicial branches, including the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *U.S. Const. Art. IV, § 3, cl. 2*. See also *Tulare County v. Bush, 353 U.S. App. D.C. 312, 306 F.3d 1138 (D.C.Cir. 2002)*; *Mountain States Legal Foundation v. Bush, 353 U.S. App. D.C. 306, 306 F.3d 1132 (D.C.Cir.2002)*; *U.S. v. Garfield County, 122 F. Supp.2d 1201 (D.Utah, 2000)*.

> 11 The Courts have upheld virtually every congressional delegation of authority made by Congress for the last 100 years. In fact, there have only been two occasions in the 20th and 21st centuries where congressional delegations of authority were deemed unconstitutional. See *A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935)*; *Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935)*.

[**49] **B. Spending Clause**

Plaintiffs contend that the Grand Staircase Monument included privately owned land, the acquisition of which required the expenditure of federal monies. This claim is without merit. [HN28] The Antiquities Act requires the President to reserve objects of historic or scientific interest that are situated upon lands owned or controlled by the government of the United States. *16 U.S.C. § 431*. The President's Proclamation creating the Grand Staircase Monument clearly distinguishes between land owned or controlled by the Government of the United States and land privately owned or controlled. The Proclamation points out that in creating the Grand Staircase Monument the President solely withdrew lands owned or controlled by the United States Government. (Proclamation, A75) With respect to privately owned or controlled lands the Proclamation provides that "Lands and interests in lands not owned by the United States shall be reserved as a part of the monument upon acquisition of title thereto by the United States." (Proclamation, A75). The Proclamation clearly indicates that land privately owned or controlled does not pertain to the Monument, but also [**50] designates that such private land may become part of the Monument if it is acquired by future action. Nothing in the Proclamation or in the record supports plaintiffs' contention that federal monies were expended to acquire private land. Furthermore, plaintiffs have failed to allege any facts supporting their contention. The Court finds no violation of the Spending Clause.

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[*1192] **3. STATUTORY CLAIMS:**

A. Wilderness Act

The land within the Grand Staircase Monument amounts to approximately 1.7 million acres. This land, withdrawn by President Clinton, constitutes what he believed to be the requisite amount of land necessary to preserve the designated scientific and historic objects. The withdrawal, according to plaintiffs, constitutes a violation of the Wilderness Act because the President created *de facto* wilderness, which is a power reserved solely to Congress. Plaintiffs' arguments are without merit, finding no support in the language of either the Wilderness Act or the Antiquities Act, or in the case law. In fact, recent case law is to the contrary; in *Mt. States Legal Found. v. Bush, 353 U.S. App. D.C. 306, 306 F.3d 1132 (D.C. Cir.2002)*, the D.C. Circuit Court of Appeals rejected [**51] this same argument.

It is undisputed that the President's designation of the Grand Staircase Monument was made pursuant to his authority under the Antiquities Act. All of the land found within the boundaries of the Monument is part of the Monument, regardless whether it could also qualify as wilderness. Though the Antiquities Act and the Wilderness Act may provide overlapping sources of protection to land that fits within the parameters of both acts, it is beyond dispute that the land reserved within the Grand Staircase Monument is not wilderness and has never been declared to be wilderness pursuant to the Wilderness Act. [HN29] The fact that some of the acreage within the boundaries of the Grand Staircase Monument is classified as Wilderness Study Areas does not preclude its inclusion in a national monument.

Statutory overlap is not unusual. Numerous statutes provide environmental protection to public land and it is not surprising that some of them overlap. In *MSLF v. Bush,* the D.C. Circuit Court of Appeals recognized several examples of this, observing that in addition to their other purposes, the Wilderness Act, *Wilderness Act 16 U.S.C. §§ 1131 36 (2000)*, the Park Service [**52] Organic Act, *16 U.S.C. §§ 1 4 (2000)*, the National Forest Management Act of 1976, Pub.L. No. 94 588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), FLPMA, *43 U.S.C. § 1701*, and the Multiple Use Sustained Yield Act, *16 U.S.C. §§ 528 29,531 (2000)*, all protect scenic values, natural wonders, and wilderness values. See *Bush, 306 F.3d at 1138*. If overlapping sources of protection were not allowed, the *Park Service Organic Act* would be a repeat offender, as it protects not only wilderness simultaneously with the Wilderness Act, but it also protects endangered species in a manner similar to the *Endangered Species Act*. As the D.C. Circuit stated, "MSLF misconceives federal laws as not providing overlapping sources of protection." *Id. at 1138*.

Plaintiffs' argument would prevent a President of the United States from including within a national monument not only lands already declared by Congress as "wilderness," a contention which is itself dubious, but also all lands that have previously been classified as Wilderness Study Areas and included in unsuccessful wilderness proposals [**53] of some members of the public and some members of Congress. Plaintiffs' contention is contrary to the purpose of the Antiquities Act, which is to identify and protect important scientific and historic objects and to set aside the necessary surrounding land to insure their continued protection. If plaintiffs' position were sound, a President would be prohibited from including within a national monument any land with the possibility of being declared wilderness, even though such land qualifies as 1) an object of historic or scientific value, or 2) land that must be set aside in order to protect designated objects. Such an outcome would effectively repeal the Antiquities Act in these circumstances, [*1193] and no such intent to repeal was expressed implicitly or explicitly by Congress in the Wilderness Act. Furthermore, if the land deemed necessary to be included within a national monument includes wilderness areas or Wilderness Study Areas, it appears likely that such lands would continue in their existing state with the attendant restrictions on use. Any other result would be in violation of the *Wilderness Act*; but nothing in either the or the Antiquities Act prevents such lands [**54] from being part of a national monument.

An underlying theme of plaintiffs' position is a belief that President Clinton and those of his political persuasion were able to (improperly) accomplish through the Antiquities Act what they had been unsuccessful in accomplishing through the Wilderness Act. The proponents of wilderness designation for approximately 900,000 acres of the federal land that ended up within the Grand Staircase Monument had earlier failed to persuade Congress to designate the land as wilderness. Thereafter, however, according to plaintiffs, they achieved most, if not all, of the protection they were seeking for this land

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when the President included the acreage within the Grand Staircase Monument. Plaintiffs feel this second, successful, effort at protecting the land was unlawful. But they can point to no law that was broken in creating the Grand Staircase Monument. The President unquestionably had the authority to do what he did under the Antiquities Act.

After briefing was closed in this case, the United States District Court for the District of Wyoming decided *Wyoming v. U.S. Dept. of Agri., et al, 277 F. Supp.2d 1197 (D.Wyo.2003)*. Plaintiffs [**55] urge this Court to follow the reasoning in that case in which the Department of Agriculture's Roadless Rule was found to be in violation of the Wilderness Act. That case and the instant case, however, have one critical difference that makes the *Wyoming* case inapplicable here. *Wyoming* concerned a rule promulgated solely within and pursuant to the authority of an executive branch department, whereas this case concerns not the rule making authority of a lower level department, but of the President himself as specifically designated by an act of Congress. This distinction is critical.

The *Wyoming* case addressed the actions of the U.S. Forest Service and the Clinton Administration which culminated in the so called "Roadless Rule" being entered as a Record of Decision by the Secretary of Agriculture on January 5, 2001. The Roadless Rule was put on a very fast track, beginning with a directive from President Clinton to the U.S. Forest Service on October 13, 1999, and ending with a fully completed (and NEPA mandated) agency review process only 15 months later. The Roadless Rule specifically prohibited road construction and other uses in inventoried roadless areas of the National [**56] Forest System, and by so doing created 58.5 million acres of what the district court referred to as *de facto* wilderness because the protection and treatment of the subject acreage was virtually indistinguishable from wilderness. In addition to finding that the hurried up process violated NEPA, the district court found that the Roadless Rule violated the Wilderness Act. Central to this latter finding were two main points. First, as stated above, the Court recognized that the land in question was *de facto* wilderness because a) the land was the same as wilderness in its definition (i.e. "roadless area" is virtually synonymous with "wilderness area"); b) the land had the same use restrictions as wilderness; and c) the land was virtually identical to the land recommended (unsuccessfully) as wilderness by the 1977 RARE II inventory. Second, the district court recognized that one of the primary objectives of the 1964 Wilderness Act was to end the then existing practice of executive [*1194] branch agencies, including notably the Forest Service, designating wilderness areas in their sole discretion and as they saw fit, with no direct authority from Congress. As the district court stated: [**57]

> To this end, the Wilderness Act removed the Secretary of Agriculture's and the Forest Service's discretion to establish de facto administrative wilderness areas, a practice the executive branch had engaged in for over forty years. Instead, the Wilderness Act places the ultimate responsibility for wilderness designation on Congress. In this regard, the Wilderness Act functions as a "proceed slowly order" until Congress through the democratic process rather than by administrative fiat can strike the proper balance between multiple uses and preservation. (citations omitted). *Id at 1233*.

The *Wyoming* court concluded its review of the Wilderness Act by stating "this statutory framework necessarily acts as a limitation on *agency* action." *Id at 1233*. Notably, the district court did not say "a limitation on *Presidential* action," and certainly nothing in the *Wyoming* opinion suggests the court would have employed the same reasoning to the creation by the President of a national monument under the Antiquities Act.

If the instant case involved actions by the Secretary of the Interior, or the BLM, to use departmental or agency rule making [**58] authority to protect federal lands that had previously failed to achieve wilderness status after having been identified as candidates for such status, and if the protection was virtually identical to the protection afforded wilderness, the outcome here might be the same as in *Wyoming.* But those are not the facts of this case and that is not the issue before this Court. Here the Court is faced with an entirely different question involving presidential action performed precisely as granted and directed by Congress.

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B. NEPA, FLPMA, FACA and the Anti-Deficiency Act

[HN30] When bringing a lawsuit for violation of statutory law parties must either find language in the statute itself which allows a private right of action, or demonstrate the occurrence of final agency action, which invokes the Court's authority to review the claim under the Administrative Procedure Act. If parties fail to meet these requirements they are precluded from challenging the alleged statutory violation. Plaintiffs allege that in his designation of the Grand Staircase Monument the President and the other defendants violated *NEPA*, *FLPMA*, *FACA* and the *Anti Deficiency Act*. These statutes, however, provide no private [**59] right of action to an aggrieved party. *See Lujan, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)* (no private right of action available under *NEPA and FLPMA); Judicial Watch, Inc. v. National Energy Policy Development Group, 219 F. Supp.2d 20, (D.D.C., July 2002)*; (Federal Advisory Committee Act creates no private right of action); *Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed.Cir.1997)* (no private right of action available under the Anti Deficiency Act).

Because none of these statutes provide private rights of action the plaintiffs are left with the insurmountable task in this case of demonstrating final agency action to invoke review under the APA. As stated previously in this Opinion [HN31] the Supreme Court of the United States has declared that the President is not an agency and cannot be defined as such under the APA. See *Franklin v. Massachusetts, 505 U.S. 788, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992)*; *Dalton v. Specter, 511 U.S. 462, 128 L. Ed. 2d 497, 114 S. Ct. 1719 (1994)*; *Armstrong v. Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 288 (D.C.Cir.1991)*. It follows that actions taken by the President pursuant to congressionally [**60] [*1195] delegated authority cannot be considered final agency action.

Also as discussed previously in this Opinion, (see pp. 23 28), plaintiffs' contention that the defendant lower level executive branch officials' recommendations to the President constituted final agency action is also without merit. Recommendations and actions taken by the lower level executive branch officials encouraging designation of the Grand Staircase Monument constituted nothing more than recommendations and assistance to the President and failed to meet the legal requirements for final agency action. See generally *Franklin, 505 U.S. at 800*. All decisions and actions constituting final action were made by the President in his official capacity. The ultimate decision to create the Grand Staircase Monument rested with, belonged to, and was made by, President Clinton.

C. Executive Order 10355

UAC next argues that the President's designation of the Grand Staircase Monument was invalid because it violated Executive Order 10355 (E.O. 10355). [HN32] E.O. 10355 was issued by President Harry S. Truman in 1952. It delegated to the Secretary of the Interior "the authority vested in the President by section [**61] 1 of the act of June 25, 1910 [the Pickett Act], and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States ... for public purposes." 17 Fed. Reg. 4831 (May 26, 1952). The Secretary of the Interior was also authorized to "modify or revoke withdrawals and reservations of such lands hertofore or hereafter made." *Id.* The Order further directed that "all orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted to the Division of the Federal Register .... for filing and for publication in the FEDERAL REGISTER." *Id.*

President Truman issued E.O. 10355 by virtue of *section 301 of title 3 of the United States Code*, [12] which [HN33] states that the President may delegate "any function which is vested in the President by law" to an agency or department head. It also states "that nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions." *3 U.S.C. § 301*. The President [**62] must publish such authorization in the Federal Register, but he may place terms, conditions, and limitations on the use of the delegated authority, and he may revoke the delegation "in whole or in part" at any time. *Id.*

12 [HN34] *3 U.S.C. § 301* is a general authorization to delegate presidential functions. Both parties in this case seem to mistakenly believe that E.O. 10355 was issued pursuant to "statutory authority under the Pickett Act" and implied authority under the *Midwest Oil* doctrine. Although it delegated the withdrawal authority under the Pickett Act and the *Midwest Oil*

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doctrine, the authority to delegate those withdrawal powers came from *3 U.S.C. § 301*, not from the withdrawal authority itself.

Plaintiffs contend that the phrase "authority otherwise vested in him" in E.O. 10355 include the authority to withdraw lands under the Antiquities Act and transfers the President's authority under that Act exclusively to the Secretary of the Interior. For this [**63] argument to prevail, several prerequisites must have been fulfilled: 1) E.O. 10355 must have contemplated the transfer of the President's authority under the Antiquities Act, 2) the transfer must have been valid, that is, the underlying statute must allow such a transfer, 3) the transfer must have been complete, meaning that the President retained no authority under the Antiquities Act, and 4) E.O. 10355 must still be in [*1196] force; i.e. it has not since been repealed or revoked. If any of these conditions has not been met, E.O. 10355 poses no restraint on the President's authority to designate a national monument under the Antiquities Act.

1. Delegation of Authority under the Antiquities Act

It is questionable whether E.O. 10355 ever delegated the authority granted to the President under the Antiquities Act. Although the language of the Order is general, to construe the Order as granting every withdrawal authority possessed by the President would, in the Court's view, be an overly broad interpretation. E.O. 10355 specifically delegates to the Secretary of the Interior the President's authority under the Pickett Act as well as "the authority otherwise vested in [the President] [**64] to withdraw and reserve lands ..." The broad, almost all encompassing language of the Order presents an ambiguity and should be interpreted with reference to the entire Order. *See, In re Crowell, 305 F.3d 474, 478 (6th Cir. 2002)* [HN35] (administrative orders delegating authority to agency officials warrant the use of rules of construction similar to those used in statutory interpretation); *U.S. v. Brown, 348 F.3d 1200, 1209 (10th Cir. 2003)*(to determine the meaning of ambiguous language in regulations, a court should look for clues elsewhere in those regulations); *citing, Oxy USA, Inc. v. Babbitt, 268 F.3d 1001, 1005 (10th Cir. 2001)*(similar rule for statutory construction).

The defendants argue that "the authority otherwise vested in him" refers to the authority granted to the President under the *Midwest Oil* doctrine, [13] which seems reasonable given that the authority under both the Pickett Act and the *Midwest Oil* doctrine are similar and related. This interpretation would also help explain why President Truman did not refer specifically to the Antiquities Act in delegating the President's withdraw authority, a practice to which [**65] he seemed accustomed. *See, e.g.,* Exec. Order No. 10250, *16 Fed. Reg. 5385 (June 5 1951)*, *reprinted as amended in 3. U.S.C.A. § 301* at 849 51 (1997)(delegating functions to the Secretary of the Interior and specifying more than 15 statutes from which those functions were derived).

13 The *Midwest Oil* doctrine stems from the Supreme Court case *United States v. Midwest Oil Co., 236 U.S. 459, 59 L. Ed. 673, 35 S. Ct. 309 (1915)*. In *Midwest Oil,* President Theodore Roosevelt issued a special Order in anticipation of the Pickett Act withdrawing all public lands which were being used for petroleum exploration. The Order was challenged, but was upheld by the Court. The Court recognized that the President was not acting in a novel manner, but rather was following a precedent that had been set many years before by his predecessors.

Moreover, [HN36] courts will generally give substantial deference to the President's or the applicable department's interpretation and use of an executive order. *See* [**66] *e.g., Alaniz v. Office of Pers. Mgmt., 728 F.2d 1460, 1465 (Fed. Cir. 1984)*("it is recognized that an agency has presumed expertise in interpreting executive orders charged to its administration, and judicial review must accord great deference to the agency's interpretation"), *citing Udall v. Tallman, 380 U.S. 1, 16 17, 85 S. Ct. 792, 801 2, 13 L. Ed. 2d 616 (1965)*. [14] Since E.O. 10355 [*1197] was issued, land has been withdrawn on 20 different occasions to create national monuments. [15] Each of these monuments was designated by the President. No national monument has been designated by the Secretary of the Interior pursuant to E.O. 10355 since its enactment in 1952. Such action on the part of both the President and the Secretary of the Interior strongly indicates that neither interpreted E.O. 10355 to include the authority granted under the Antiquities Act. As a result, this Court will not imply such an interpretation.

14 *Udall* is particularly relevant to the present dispute. In *Udall,* the Supreme Court upheld the actions of the Secretary of Interior and deferred to the Secretary's interpretation of an executive order

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granting him authority to act. The Court's language is particularly helpful:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration .... When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order ... "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation."

Udall, 380 U.S. at 16 17, 85 S. Ct. at 801 2, 13 L. Ed. 2d 616, quoting *Midwest Oil, 236 U.S. at 472 3, 35 S. Ct. at 319, 59 L. Ed. 673*.

[**67]

15 Below is a list of national monuments designated pursuant to the Antiquities Act since E.O. 10355 was issued, along with the respective President who exercised the withdrawal authority.

Dwight D. Eisenhower

7/14/56 Edison Laboratory, NJ

1/18/61 Chesapeake and Ohio Canal, MD WV

John F. Kennedy

5/11/61 Russell Cave, AL

12/28/61 Buck Island Reef, VI

Lyndon B. Johnson

1/20/69 Marble Canyon, AZ

Jimmy Carter

12/1/78 Admiralty Island, AK (Forest Service)

12/1/78 Aniakchak, AK

12/1/78 Becharof, AK

12/1/78 Bering Land Bridge, AK

12/1/78 Cape Krusenstern, AK

12/1/78 Denali, AK

12/1/78 Gates of the Arctic, AK

12/1/78 Kenai Fjords, AK

12/1/78 Kobuk Valley, AK

12/1/78 Lake Clark, AK

12/1/78 Misty Fjords, AK (Forest Service)

12/1/78 Noatak, AK

12/1/78 Wrangell St. Elias, AK

12/1/78 Yukon Charley, AK

12/1/78 Yukon Flats, AK

2.Validity of a delegation of Antiquities Act Authority

Even assuming that E.O. 10355 originally contemplated within its language delegating the authority to withdraw land for designating national monuments,

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[HN37] "a President may only [**68] confer by Executive Order rights that Congress has authorized the President to confer." *Karuk Tribe of California v. Ammon, 209 F.3d 1366, 1375 (Fed. Cir. 2000)*. As the regulations implementing *section 204 of FLPMA* recognized, E.O. 10355 "conferr[ed] on the Secretary of the Interior all of the *delegable* authority of the President..." *43 C.F.R. § 2300.0 3(a)(2)(2004)*(emphasis added).

[HN38] Although *3 U.S.C. § 301* authorizes the President to delegate "any function which is vested in [him] by law" to a department or agency head in the executive branch, delegation of the authority to designate national monuments seems inconsistent with the Antiquities Act itself. The Antiquities Act provides that "[t]he President ... is authorized, *in his discretion,* to [designate national monuments]." *16 U.S.C. § 431 (2000)* (emphasis added). Because Congress only authorized the withdrawal of land for national monuments to be done in the President's discretion, it follows that the President is the only individual who can exercise this authority because only the President can exercise his own discretion. [**69] Discretion is defined as "[a] public official's power or right to act in [*1198] certain circumstances according to personal judgment and conscience." BLACK'S LAW DICTIONARY 479 (7th cd. 1999). It is illogical to believe that the President can delegate his personal judgment and conscience to another.

Moreover, E.O. 10355 authorizes the Secretary of the Interior to "redelegate the authority delegated to him by this order to ... the Under Secretary of the Interior and [to] the Assistant Secretaries of the Interior." If the Court were to accept UAC's argument, the unfettered discretion [16] of the President to withdraw public lands for national monuments could potentially be vested in several individuals. Such a result is untenable and clearly beyond what Congress intended when passing the Antiquities Act.

> 16 [HN39] Although FLPMA imposes numerous requirements on the Secretary of the Interior when withdrawing land, the Antiquities Act was specifically exempted from the reach of FLPMA. In passing FLPMA, the House stated:
>
> > The main authority used by the Executive to make withdrawals is the 'implied' authority of the President recognized by the Supreme Court in *U.S. v. Midwest Oil Co. (236 U.S. 459, 59 L. Ed. 673, 35 S. Ct. 309*). The bill would repeal this authority and, with certain exceptions, all identified withdrawal authority granted to the President or the Secretary of the Interior. The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments), *Alaska Native Claims Settlement Act* (native and public interest withdrawals), the*Defense Withdrawal Act of 1958*, and *Taylor Grazing Act* (grazing districts).
>
> H.R. Rep. No. 94 1163, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6203.
>
> Therefore, when the President is creating national monuments pursuant to the Antiquities Act, his discretion would be unquestioned by Congress. If E.O. 10355 did indeed delegate to the Secretary of the Interior the President's Antiquities Act authority, it stands to reason that FLPMA would remain inapplicable to the actions of the Secretary if the Secretary designated a national monument.

[**70] This Court is persuaded that the President, and only the President, may designate National monuments under the Antiquities Act regardless whether President Truman intended to delegate this authority by means of E.O. 10355. The Court finds support for its interpretation in *State of Alaska v. Carter, 462 F. Supp. 1155, 1159 (D. Alaska 1978)* [HN40] ("The Antiquities Act authorizes the President 'in his discretion' to declare objects that have scientific interest, and are situated upon the public lands, to be national monuments. The Act authorizes only the President to declare these reservations and apparently this authority cannot be delegated." (citations omitted)).

3. Complete delegation of authority

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UAC's reliance on E.O. 10355 also assumes that the delegation of authority was complete; that is, that the President relinquished all of his authority under the Antiquities Act to the Secretary of the Interior, forbidding any future action by the President himself pursuant to the Act. This interpretation is suspect where the language of E.O. 10355 does not specifically limit the President nor empower the Secretary of the Interior in such a manner. Additionally, history has [**71] shown that presidents after Harry S. Truman continued to designate national monuments using the authority granted by the Antiquities Act.

The Second Circuit faced a similar question in *Clarry v. United States, 85 F.3d 1041 (2d Cir. 1996)*. In *Clarry,* former air traffic controllers had been indefinitely barred by President Reagan from employment with the Federal Aviation Administration (FAA) and private entities that contracted with the FAA because of their participation in a strike against the United States. The President ordered the indefinite bar notwithstanding the regulations [*1199] promulgated by the Office of Personnel Management (OPM), which provided for only a three year ban. The regulations had been issued pursuant to authority delegated to the OPM by the President in two prior executive orders. The Second Circuit found that the President had not specifically delegated to the OPM his statutory authority "to prohibit the employment of individuals who have participated in a strike against the United States." *Id. at 1048*. Because there was no specific delegation, the executive orders did not constitute a complete delegation of the President's authority. [**72] Therefore, nothing prevented the President from implementing an indefinite employment bar pursuant to his statutory authority and notwithstanding regulations to the contrary. *Id.*

We are faced with a similar situation. UAC argues that the President may no longer use the authority granted to him under the Antiquities Act because of E.O. 10355. However, there is nothing in the language of the Order to indicate that, even if the authority to designate national monuments was delegated to the Secretary of the Interior which the Court does not find there was a complete delegation of authority. Without a specific reference to the Antiquities Act, and some indication that the President no longer intended to designate national monuments, this Court cannot conclude that E.O. 10355 constituted a complete delegation of the President's authority. On the contrary, the fact that Presidents continued to exercise Antiquities Act authority indicates that, even if E.O. 10355 was a valid delegation of authority, the authority to withdraw national monuments remained concurrently with the President and did not solely reside with the Secretary of the Interior.

4. Revocation of E.O. 10355

[**73] In addition to the previous arguments, defendants contend that FLPMA implicitly repealed E.O. 10355, transferring all authority under the Antiquities Act, if it ever was delegated, back to the President. [HN41] "The test used to determine whether a statute has been repealed is also used for an executive order. A repeal may be explicit or implicit, [and] [t]he ultimate question is whether repeal of the prior statute [or order] was intended." *Mille Lacs Band of Chippewa Indians v. Minnesota Dep't of Natural Resources, 861 F.Supp 784, 829 (D. Minn. 1994) citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 54, 48 L. Ed. 2d 540, 96 S. Ct. 1989 (1976)*.

[HN42] Any delegation of authority pursuant to *3 U.S.C. § 301* is "revocable at any time by the President in whole or in part." Because Presidents continued to withdraw public land for national monuments after E.O. 10355 was issued, the logical conclusion is that any delegation of authority under the Antiquities Act that E.O. 10355 may have made was implicitly revoked. Such a revocation is well within the President's authority to partially revoke his own executive order.

[HN43] Additionally, FLPMA and its attendant regulations also [**74] indicate that Congress intended to repeal any delegation authority to designate national monuments to the Secretary of the Interior. Through FLPMA, Congress specifically repealed the Pickett Act, the *Midwest Oil* doctrine and other Acts granting withdrawal authority to the President, thereby extinguishing Presidential authority to withdraw public lands in many circumstances. As a result, Congress also revoked any delegations of authority to other members of the Executive Branch related to the repeal of that authority. Notably, FLPMA specifically excludes the Antiquities Act from its reach and reaffirms the President's authority to designate national monuments. Even more, the regulations seem to indicate that, even if the Secretary of the Interior previously enjoyed authority [*1200] to designate national monuments, that was no longer the case: "the Secretary of the Interior does not have authority to ... modify or revoke any withdrawal

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creating national monuments under the Act of June 8, 1906 (*16 U.S.C. 431 433*), sometimes referred to as the Antiquities Act." *43 C.F.R. § 2300.0 3(a)(1)(iii)*. Although the regulations go on to state that, [**75] by virtue of E.O. 10355, the Secretary still possesses all the delegable Presidential authority to "make, modify and revoke withdrawals and reservations with respect to lands of the public domain ...," *43 C.F.R. § 2300.0 3(a)(2)*, it appears evident that Congress never considered authority under the Antiquities Act as "delegable" in the first place.

Therefore, any effect E.O. 10355 may have had on the President's authority to withdraw land for national monuments under the Antiquities Act has been repealed, both by Presidential action and Congressional legislation.

5. Private Right of Action to Enforce Executive Orders

Finally, even if this Court were to accept UAC's argument that because of E.O. 10355 the Secretary of the Interior is currently the only individual invested with authority to withdraw public land to create national monuments pursuant to the Antiquities Act, the Court questions whether UAC or a court can enforce E.O. 10355. It is well settled that [HN44] "generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders." *Zhang v. Slattery, 55 F.3d 732, 747 (2nd Cir. 1995)* [**76] (quotations and citations omitted). Furthermore, "to assert a judicially enforceable private cause of action under an executive order, a plaintiff must show (1) that the President issued the order pursuant to a statutory mandate or delegation of authority from Congress, and (2) that the Order's terms and purpose evidenced an intent [on the part of the President] to create a private right of action." *Centola v. Potter, 183 F. Supp.2d 403, 413 (D. Mass. 2002)*, citing *Indep. Meat Packers Ass'n. v. Butz, 526 F.2d 228, 234 35 (8th Cir. 1975)*. E.O. 10355 fails on both counts to create a private right of action.

First, E.O. 10355 was not issued pursuant to a "statutory mandate" from Congress and therefore does not have the effect of law. Were this so, there would be some language in the Antiquities Act itself directing the President to delegate or otherwise employ the authority granted to him. There is no such mandate from Congress. Rather, President Truman resorted to *3 U.S.C. § 301* as authority for E.O. 10355, which grants broad delegation authority to the President. This authority seems managerial in nature, giving the President [**77] the ability to direct and delegate the affairs of the executive branch in a manner he deems best. Because this was an internal delegation in the executive branch, revokable at any time by the President, E.O. 10355 does not have the force or effect of law.

Second, there is nothing in E.O. 10355 itself indicating that President Truman intended to create a private right of action to enforce compliance with the order. [HN45] In the absence of such an intent on the face of the order, this Court will not imply one.

UAC's argument that E.O. 10355 forbids the President from withdrawing public lands for national monuments fails on many levels, any one of which is sufficient for this Court to hold that E.O. 10355 did not prohibit the President from designating the Grand Staircase Monument under the Antiquities Act.

CONCLUSION

For the foregoing reasons, defendants' Motion to Dismiss and in the alternative for Summary Judgment is GRANTED; [*1201] plaintiffs' Motions for Summary Judgment are DENIED in their entirety. IT IS SO ORDERED.

Dated this 19th day of April, 2004.

Dee Benson

United States District Judge

DOI-2019-06 02250

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DISTRICT OF UTAH
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

UTAH ASSOCIATION OF COUNTIES, on behalf of its members

Plaintiffs,

vs.

GEORGE W. BUSH, in his official capacity as PRESIDENT OF THE UNITED STATES, et al.,

Defendants.

and

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

Defendants-Intervenors.

MOUNTAIN STATES LEGAL FOUNDATION, on behalf of its members

Plaintiffs,

vs.

GEORGE W. BUSH, in his official capacity as PRESIDENT OF THE UNITED STATES, et al.,

Defendants.

and

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

Defendants-Intervenors.

OPINION AND ORDER

Case No. 2:97CV0479

2:97CV0863

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INTRODUCTION

The present matter comes before the Court on defendants' Motion to Dismiss or in the alternative for Summary Judgment and plaintiffs' Motions for Summary Judgment. The motions were argued before the Court on January 15, 2004. The Court has considered the legal briefs and oral arguments of the respective parties and enters the following Opinion and Order.

BACKGROUND

A. THE LAWSUITS AND THEIR CONTENTIONS

On September 18, 1996, President William Jefferson Clinton, invoking his authority under the Antiquities Act, designated 1.7 million acres of federal land in southeastern Utah as the Grand Staircase-Escalante National Monument. On June 23, 1997, the Utah Association of Counties, (UAC) filed this lawsuit challenging the President's actions, naming as defendants the United States of America, William J. Clinton in his official capacity as President of the United States, Kathleen McGinty in her official capacity as chair of the Council on Environmental Quality (CEQ), Secretary of the Interior Bruce Babbitt, the United States Department of the Interior (DOI), and Patrick Shea, Director of the Bureau of Land Management (BLM).

On November 5, 1997 Mountain States Legal Foundation (MSLF) filed a similar suit against defendants Clinton, Babbitt, and the United States of America. A month later, MSLF filed an amended complaint, which added defendant McGinty. UAC's and MSLF's cases were consolidated.[1]

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[1] Pursuant to Federal Rules of Civil Procedure 25(d)(1), defendants have since been substituted to reflect a presidential and administration change. Current individual defendants are now President George W. Bush; CEQ Chair James L. Connaughton; Department of the Interior Secretary Gale Norton and Bureau of Land Management Director Kathleen Clarke.

Plaintiffs allege:

1) The Antiquities Act is unconstitutional because it violates the delegation doctrine. Plaintiffs claim that only Congress has the authority to withdraw such lands from the federal trust.

2) By creating the Grand Staircase Monument the President acted *ultra vires* and violated the following provisions of the United States Constitution:

a) the Property Clause, U.S. Const., Art. IV, § 3, cl. 2; because the authority to manage federal lands rests exclusively with Congress; and

b) the Spending Clause, U.S. Const., Art. I, § 8, cl. 1; because only Congress has the authority to obligate money which will be drawn from the Treasury to purchase private property.

3) By creating the Grand Staircase Monument the President violated:

a) the Antiquities Act, 16 U.S.C. § 431; because he failed to designate the requisite objects of historic or scientific value and he did not limit the size of the monument to the "smallest area" necessary to preserve the objects.

b) the Wilderness Act, 16 U.S.C.A. § 1131 *et seq.*; because the President established as *de facto* wilderness areas within the Grand Staircase Monument, and only Congress has the authority to designate public lands as wilderness.

c) Executive Order 10355, because the President, rather than the Secretary of the Interior, withdrew the land.

4) By creating the Grand Staircase Monument the President and/or one or more of the other defendants violated:

a) the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 *et seq*; because the joint activities of the Department of the Interior and CEQ were carried out independently of the President and were in fact initiated by DOI, and therefore these actions required the preparation of an Environmental Impact Statement (EIS) and compliance with other NEPA regulations, which did not happen.

b) the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq*.; because the President's withdrawal of public lands did not comply with FLPMA's withdrawal, notice and land use planning provisions.

c) the Federal Advisory Committee Act (FACA), 5 U.S.C. app 2; because advice and recommendations were received by the President and other defendants from various individuals who constituted an "advisory committee" within the meaning of FACA and therefore required compliance with FACA's procedural standards.

d) The Anti-Deficiency Act, 31 U.S.C. § 1341; because an improper appropriation was created.

Both plaintiffs seek summary judgment as to all of the above claims.

All of the defendants seek dismissal or in the alternative summary judgment as to all claims. They challenge the Court's jurisdiction to hear the case under the doctrines of standing (as to MSLF only), ripeness and lack of judicial review authority. As to the plaintiffs' claims of violations of the United States Constitution and federal statutes, the defendants seek dismissal as a matter of law.

1. THE ANTIQUITIES ACT

The Antiquities Act of 1906, 16 U.S.C. § 431, gives the President authority to create

national monuments.[2] Since its enactment, presidents have used the Antiquities Act more than 100 times to withdraw lands from the public domain as national monuments. President Clinton's use of the Antiquities Act to create the Grand Staircase Monument in 1996 was the first use of the Antiquities Act in more than two decades. The Antiquities Act authorizes the President, "in his discretion," to establish as national monuments "objects of historic or scientific interest that are situated upon the lands owned or controlled by the government of the United States." *Id.* The Act requires the president to reserve land confined to the "smallest area compatible with the proper care and management of the objects to be protected." *Id.* For purposes of this litigation, it is helpful to look to the creation of the Act and how it has been used and interpreted since its creation in 1906.

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[2] The full text of the Act reads as follows:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

16 U.S.C. § 431 (1976).

The original purpose of the proposed Act was to protect objects of antiquity.[3] The substance of the Act, developed over a period of more than six years, was created in response to the demands of archaeological organizations. Although the scope of the archaeological organizations' proposals was limited to preservation of antiquities on federal lands, the United States Department of the Interior proposed adding the protection of scenic and scientific resources to the Act. For six years Congress rejected attempts to include the Department's proposal. It appears, however, that Congress was unable to pass the limited archaeologists' bill because of bureaucratic delays and various disagreements between museums and universities seeking authority to excavate ruins on public lands. *See* Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 Wash. L. Rev. 439, 448 (1981).

Edgar Lee Hewitt, a prominent archaeologist, drafted the bill that was finally enacted in 1906. Government officials persuaded Hewitt to broaden the scope of his draft by including the phrase "other objects of historic or scientific interest." This phrase essentially allowed the Department of the Interior's proposal, which Congress had previously rejected, to be included in the final bill. In addition, while earlier proposals had limited the reservations to 320 or at the most 640 acres, Hewitt's draft allowed the limit to be set according to "the smallest area compatible with the proper care and management of the objects to be protected." Despite the presence of this broader language, there is some support for the proposition that Congress

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[3] The phrase "objects of antiquity," while not in § 431 but found in § 433, has commonly been interpreted to include such items as paleontological and archaeological artifacts. When interpreting its precise meaning, however, courts have disagreed with the adequacy of the phrase. *See e.g., U.S. v. Diaz*, 499 F.2d 113, 114-5 (9th Cir. 1974) (finding that the phrase "objects of antiquity" was "fatally vague in violation of the due process clause of the Constitution."); *but see U.S. v. Smyer*,, 596 F.2d 939, 941 (10th Cir. 1979) (holding that "when measured by common understanding and practice," the phrase was sufficiently definite to define the protected object).

intended to limit the creation of national monuments to small land areas surrounding specific objects. Illustrative of this intent is House Report No. 2224, which states "[t]here are scattered throughout the southwest quite a large number of very interesting ruins . . . [t]he bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics." H.R. REP. NO. 2224, 59TH CONGRESS, 1ST SESS. at 1 (1906).

Despite what may have been the intent of some members of Congress, use of the Antiquities Act has clearly expanded beyond the protection of antiquities and "small reservations" of "interesting ruins." Nothing in the language of the Act specifically authorizes the creation of national monuments for scenic purposes or for general conservation purposes. Nonetheless, several presidents have used the Act to withdraw large land areas for scenic and general conservation purposes. President Theodore Roosevelt was the first president to withdraw land under the Act, establishing a precedent other presidents later followed to create large scenic monuments. Within two years of enactment of the Act, President Roosevelt made eighteen withdrawals of land.[4]

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[4] The national monuments created by President Theodore Roosevelt:
9/24/06 Devils Tower, WY
12/8/06 El Morro, NM
12/8/06 Montezuma Castle, AZ
12/8/06 Petrified Forest, AZ
3/11/07 Chaco Canyon, NM
5/6/07 Cinder Cone, CA
5/6/07 Lassen Peak, CA
11/16/07 Gila Cliff Dwellings, NM
12/19/07 Tonto, AZ
1/9/08 Muir Woods, CA
1/11/08 Grand Canyon, AZ
1/16/08 Pinnacles, CA
2/7/08 Jewel Cave, SD
4/16/08 Natural Bridges, UT

Several monuments have been created within the general vicinity of the Grand Staircase Monument. In Utah alone, there are six such national monuments: Cedar Breaks, Hovenweep, Timpanogos Cave, Dinosaur, Rainbow Bridge, and Natural Bridges. Surrounding areas in Colorado and Arizona have also been designated as monuments under the Antiquities Act. Presidential proclamations creating these monuments cited geologic, paleontologic, archaeologic, and other features similar to those in the Grand Staircase Monument proclamation. Zion National Park to the west of the Grand Staircase Monument was originally Mukuntuweap National Monument, created by President Taft in 1909 to protect its "many natural features of unusual archaeologic, geologic, and geographic interest." See Proclamation No. 877, 36 Stat. 2498. President Wilson enlarged the boundaries of the monument in 1918 and Congress converted it to a national park in 1919.

President Hoover established Utah's Arches National Monument to the northeast of the Grand Staircase Monument in 1929, citing its "unique wind-worn sandstone formation, the preservation of which is desirable because of their educational and scenic value." Proclamation No. 1875, 46 Stat. 2988. Congress designated Arches a National Park in 1971. President Franklin D. Roosevelt established Utah's Cedar Breaks National Monument, located west of the Grand Staircase Monument, in 1933 (Proclamation No. 2054, 48 stat. 1705.), and Capital Reef National Monument, which is located to the immediate east of the Grand Staircase Monument, in 1938. (Proclamation No. 2246, 50 Stat. 1856.)

5/11/08 Lewis and Clark Cavern, MT
9/15/08 Tumacacori, AZ
12/7/08 Wheeler, CO
3/2/09 Mount Olympus, WA

Coincidentally, during the 1930s, the Franklin D. Roosevelt administration considered the creation of a monument in virtually the same area as the Grand Staircase Monument. President Roosevelt received a recommendation to withdraw 4.4. million acres of Utah's red rock country, creating Escalante National Monument. The Roosevelt administration ultimately rejected the idea, in large part because of local opposition. *See* James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 488 (1999).

Most of the presidential withdrawals have been uncontroversial. However, there have been several legal challenges to presidential monument designations under the Antiquities Act. Every challenge to date has been unsuccessful. *See Cameron v. United States*, 252 U.S. 450 (1920) (the President's designation of the Grand Canyon as a national monument was a valid use of his authority under the Antiquities Act); *Wyoming v. Franke*, 58 F. Supp. 890 (D.Wyo.1945) (the proclamation creating the Jackson Hole National Monument complied with the standards set forth in the Antiquities Act); *Cappaert v. United States*, 426 U.S. 128 (1976) (presidential proclamation withdrawing the Devil's Hole tract of land and accompanying water from the public domain and combining it with the Death Valley National Monument, explicitly reserved water rights to the federal Government and constituted a valid exercise of presidential authority under the Antiquities Act); *Anaconda Copper Co. v. Andrus*, No. A79-101 (D. Alaska, 1980); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (president not subject to requirements of National Environmental Policy Act when proclaiming national monuments under the Antiquities Act).

2. THE WILDERNESS ACT

Also relevant to the present motions is the Wilderness Act, 16 U.S.C. §§ 1131-36 (1964). The Wilderness Act, signed into law in 1964, was intended to preserve the undeveloped character

of designated areas. Prior to passage of the Wilderness Act, the United States Forest Service and the United States National Park Service were the only two federal agencies with a management scheme to preserve wilderness areas. Selection and management of the lands was discretionary. Concerned that some areas were not receiving the necessary protection and perhaps that some were receiving too much, Congress created a means by which a system of wilderness could be created that would provide the appropriate safeguards and that designated Congress alone as the final arbiter of which federal lands would actually achieve status as wilderness areas. *See* Leann Foster, *Wildlands and System Values: Our Legal Accountability to Wilderness,* 22 VT. L. REV. 917, 921-22 (1998).

The Wilderness Act directed the Secretary of Agriculture and the Secretary of the Interior to review certain lands within their jurisdictions and make recommendations as to their suitability for wilderness classification. *See id.* § 1132 (d)(1). The areas to be studied were identified as Wilderness Study Areas (WSAs). *See id.* § 1131. Once the lands were inventoried, BLM was to conduct a study of each WSA, pursuant to Section 603 of FLPMA, 43 U.S.C. § 1782. The BLM would then make a recommendation to the President, who in turn would recommend to Congress whether any of the WSAs should be designated as wilderness. Until such designation occurs, the administering agency is to manage the WSAs so as not to impair their suitability for possible wilderness classification by Congress. *See* 16 U.S.C. § 1133. Once an area receives actual wilderness status, commercial enterprises, roads, motorized equipment, mining, and oil and gas leasing are prohibited in the wilderness area. *See id.*

Approximately 900,000 acres, roughly one-half of the acreage within the Grand Staircase Monument, are classified as WSAs and therefore preserved for suitability for possible future

preservation as wilderness. Congress has not made a final determination with regard to the WSAs within the Grand Staircase Monument.

3. EVENTS LEADING TO THE GRAND STAIRCASE PROCLAMATION

From 1978 to 1991, the BLM conducted various studies which resulted in a recommendation that 1.9 million acres of WSAs in the state of Utah should receive wilderness designation. This recommendation, which included some of the land now part of the Grand Staircase Monument, was forwarded by then Secretary of the Interior Manuel Lujan to President George H. W. Bush in October, 1991. The recommendation was supported by a final EIS, and more than 11 years of BLM evaluation and public involvement. However, a change in presidential administrations in 1992 ended discussion about the proposed designation.

Regarding Utah wilderness, the new Secretary of the Interior, Bruce Babbitt, disagreed with the recommendations of his predecessor, believing significantly more land should be set aside. In 1994, then BLM Director Jim Baca wrote to an environmental group stating that the 1.9 million acre wilderness recommendation made by former Interior Secretary Lujan was "off the table." However, Secretary Babbitt's ability to undertake a new wilderness study pursuant to Section 603 of FLPMA had expired. Nevertheless, Secretary Babbitt testified before Congress on several occasions, urging that a considerable number of additional wilderness areas should be designated in Utah. Consequently, the 104th Congress (1995-96) considered several different Utah wilderness bills, including a bill sponsored by members of Utah's congressional delegation which would designate about two million additional acres of wilderness, which was essentially the same as the previous recommendation from former Secretary Lujan. Also under consideration was a bill sponsored by Congressman Hinchey of New York and supported by

national and Utah environmental groups. The Hinchey bill sought to designate 5.7 million acres of wilderness in Utah. Neither bill reached the floor of the House, and a filibuster precluded a vote in the Senate. Thereafter, Secretary Babbitt directed a second wilderness inventory, the Utah Wilderness Review, in hopes of showing that Congressman Hinchey's proposed 5.7 million acres bill warranted passage. This Utah Wilderness Review included the evaluation of the wilderness characteristics of approximately 800,000 acres of public land now part of the Grand Staircase Monument. Eventually, however, Secretary Babbitt's efforts, along with all other efforts made by those in Congress to establish wilderness in the state of Utah, were unsuccessful.

Plaintiffs contend in this litigation that the lack of success in the effort to designate additional wilderness areas in Utah was a motivating factor behind the President's decision to designate the Grand Staircase Monument. Once the proclamation was announced the affected land was preserved in much the same manner as if it had received wilderness designation.

Plaintiffs assert, and the record appears to support, that another driving force behind Secretary Babbitt's, the DOI's, and eventually the President's efforts to create the Grand Staircase Monument was to prevent the proposed Andalex Smoky Hollow coal mining operation in Kane County, Utah from coming to fruition.[5] Besides supporting Congressman Hinchey's proposed wilderness designation, which would encompass the property proposed for the Smoky Hollow Mine, Secretary Babbitt and the DOI also attacked the validity of the federal Smoky

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[5] The Andalex Smoky Hollow coal mine was designed as an underground mine, affecting approximately 60 acres of surface space, to be located on property that is part of the Kaiparaowits coal field. The Kaiparowits coal field is estimated by the Utah Geological Survey to contain 62.3 billion tons of coal, of which at least 11.3 billion tons could be recovered. The estimated total federal royalty payments over time from full production of Kaiparowits coal are approximately $20 billion, and the State of Utah and Utah counties would have been entitled to 50% of that amount under the Mineral Leasing Act.

Hollow coal leases by attempting to cancel the suspension in the interest of conservation granted to the holders of the coal leases several years earlier by the Utah BLM State Director. The suspension was originally granted to allow Andalex sufficient time to secure mining permits and complete preparation of an EIS.

From the exhibits submitted by plaintiffs, the majority of which were secured by congressional subpoena, it appears that in early 1996, efforts involving various officials within the executive branch of government began discussing the possibility of creating a national monument in Utah by way of a presidential proclamation. Internal memoranda indicate that as early as March 1996, the DOI requested that CEQ or White House officials send a letter to Secretary Babbitt under the President's signature requesting an investigation and recommendations for a Utah national monument. Plaintiffs assert that the reasoning behind the request was to enable defendants to avoid having to comply with NEPA and FLPMA, because the President is not a federal agency and not subject to either NEPA or FLPMA. An internal CEQ memorandum from Ms. McGinty to Todd Stern reveals even broader reasoning behind the request that the President sign a letter to be sent to Secretary Babbitt:

> the president will do the utah event on aug 17. however, we still need to get the letter (from the President to Interior Secretary Babbitt) signed asap. the reason: under the antiquities act, we need to build a credible record that will withstand legal challenge that: (1) the president asked the secretary to look into these lands to see if they are of important scientific, cultural, or historic value; (2) the secy undertook that review and presented the results to the president; (3) the president found the review compelling and therefore exercised his authority under the antiquities act. presidential actions under this act have always been challenged, they have never been struck down, however. so, letter needs to be signed asap so that secy has what looks like a credible amount of

> time to do his investigation of the matter. we have opened the letter with a sentence that gives us some more room by making it clear that the president and babbitt had discussed this some time ago. [sic] (McGinty, e-mail to Todd Stern, July 29, 1996).

Plaintiffs allege that no such letter was sent to Secretary Babbitt.

From March 1996 to September 18, 1996, DOI officials worked closely with CEQ Director Kathleen McGinty and others to identify the lands to include in the proclamation and the actions needed to ensure that the proclamation would survive judicial scrutiny. In August 1996, the DOI conducted a database and bibliography search to prepare a record to support the proclamation. Some of the reasons for creating Grand Staircase Monument focused on the proposed Smoky Hollow coal mine and contentions that the mine would irreversibly damage the environment and Utah's public lands. These contentions, plaintiffs allege, were contradicted by the BLM's draft EIS.

Following this history, the Proclamation itself took place on September 18, 1996, when President Clinton stood at the south rim of the Grand Canyon in Arizona and announced the establishment of the 1.7 million acre Utah monument. There was virtually no advance consultation with Utah's federal or state officials, which may explain the decision to make the announcement in Arizona. The monument created a good deal of controversy, heightened even more because the presidential election was less than 8 weeks away. In making the announcement, President Clinton emphasized his "concern[] about a large coal mine proposed for the area" and his belief that "we shouldn't have mines that threaten our national treasures." *Remarks Announcing the Establishment of the Grand Staircase-Escalate National Monument*, 32 Weekly Comp. Pres. Doc. 1785 (Sept. 23, 1996).

In the written Proclamation, President Clinton cited "geologic treasures" as the initial

reason for creation of the monument. *See* Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996). Specifically, the President noted "sedimentary rock layers . . . offering a clear view to understanding the processes of the earth's formation" and "in addition to several major arches and natural bridges, vivid geological features are laid bare in narrow, serpentine canyons, where erosion has exposed sandstone and shale deposits in shades of red, maroon, chocolate, tan, gray, and white. Such diverse objects make the monument outstanding for purposes of geologic study." *Id.* Secondly, the President cited "world class paleontological sites" as grounds for the Proclamation. *Id.* According to the President, those things in need of protection consisted of "remarkable specimens of petrified wood" and "significant fossils, including marine and brackish water mollusks, turtles, crocodilians, lizards, dinosaurs, fishes, and mammals. . . ." *Id.* Archeological interests in "Anasazi and Fremont cultures" were also said to be "of significant scientific and historic value worthy of preservation for future study." *Id.* Finally, the President mentioned the "spectacular array of unusual and diverse soils," "cryptobiotic crusts," and the "many different vegetative communities and numerous types of endemic plants and their pollinators" as warranting protection since "[m]ost of the ecological communities contained in the monument have low resistance to, and slow recovery from, disturbance." *Id.*

The President's Proclamation designating the monument required that the BLM prepare an approved Monument Management Plan no later than September 18, 1999. The approved Management Plan did not make the September deadline, but was finally approved on February 28, 2000. Since approval of the Monument Management Plan the BLM has been responsible for management of the Grand Staircase Monument.

4. SUMMARY OF OPINION

The record is undisputed that the President of the United States used his authority under the Antiquities Act to designate the Grand Staircase Monument. The record is also undisputed that in doing so the President complied with the Antiquities Act's two requirements, 1) designating, in his discretion, objects of scientific or historic value, and 2) setting aside, in his discretion, the smallest area necessary to protect the objects. With little additional discussion, these facts compel a finding in favor of the President's actions in creating the monument. That is essentially the end of the legal analysis. Clearly established Supreme Court precedent instructs that the Court's judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go. *Dalton v. Specter*, 511 U.S. 462 (1994); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). When the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion. See *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371 (1940). To do so would impermissibly replace the President's discretion with that of the judiciary.

This Court has the authority to review whether the President's actions violated the United States Constitution or another federal statute, such as the Wilderness Act. See *Franklin v. Massachusetts,* 505 U.S. at 801; see also *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); and *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). In the present case plaintiffs' constitutional and statutory claims are without factual or legal support. Congress clearly had the authority to pass the Antiquities Act of 1906. It is a proper constitutional grant of authority to the President. The

Act itself, and the President's designations pursuant to the Act, are not inconsistent with the Constitution's Property Clause, Spending Clause, or the delegation doctrine; nor is the President's Proclamation in violation of the Wilderness Act or any other federal statute. No statute passed after the Antiquities Act has repealed or amended the Antiquities Act. It stands as valid law. Only Congress has the power to change or revoke the Antiquities Act's grant of virtually unlimited discretion to the President.

As for plaintiffs' myriad claims based on NEPA, FLPMA, FACA and the Anti-Deficiency Act, they too are of no merit. These statutes do not provide for a private right of action. The only way parties such as the plaintiffs here may complain of a violation of these statutes is through the Administrative Procedure Act (APA), which requires a finding of final agency action. Here, there is no such final agency action. The President is not an agency, and the record is undisputed that the actions of the other defendants were only assisting the President in the execution of his discretion under the Antiquities Act.

Plaintiffs' claim that the President's designation of the Grand Staircase Monument violates the Wilderness Act is unavailing. Although a significant percentage of the land in the Grand Staircase Monument may qualify as wilderness under the Wilderness Act, the President did not designate wilderness; he designated a national monument. While the Antiquities Act and the Wilderness Act in certain respects may provide overlapping sources of protection, such overlap is neither novel nor illegal, and in no way renders the President's actions invalid.

Executive Order 10355, adopted by the Executive Branch in 1952, did not eliminate the President's withdrawal authority under the Antiquities Act. The President has no law-making authority. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. at 587. The use of executive

orders may be employed by the President in carrying out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials, but an executive order cannot impose legal requirements on the executive branch that are inconsistent with the express will of Congress. Executive Order 10355 by its express terms does not eliminate the President's authority, as granted specifically to the President by Congress. Furthermore, by specifically exempting the Antiquities Act from the reach of FLPMA in 1976, for example, Congress reaffirmed that the Antiquities Act was to continue to not be subjected to requirements that must be followed by lower-level executive officials. Whatever else may by said about the possible reach of Executive Order 10355, it is undisputed that since its passage in 1952 there have been 20 presidential proclamations creating national monuments and none have transferred the exercise of withdrawal authority to the Secretary of the Interior.

B. DISCUSSION

1. JUDICIAL REVIEW [6]

Plaintiffs seek a searching review by this court of the President's actions in creating the Grand Staircase Monument. Both plaintiffs claim the proclamation was *ultra vires* and unconstitutional. MSLF seeks a further determination that the President abused his discretion,

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[6] With respect to the issue of standing to sue, the United States concedes that UAC has standing, but insists MSLF does not. The requirements for an initial showing sufficient to support standing in a case of ths nature are relatively lenient, as set forth in *Utah v. Babbitt*, 137 F.3d 1193, (10thCir.1998), *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221 (10thCir.2004) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Given this relatively light burden at the present stage of the instant case and recognizing that many of the claims of UAC and MSLF are identical or similar, and in the interest of judicial economy the Court will not further address the standing question in this Opinion. While not expressly finding that MSLF has standing to sue, the Court will address all of the parties'claims, including those advanced solely by MSLF.

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asking in particular for a finding that the President violated the Antiquities Act by a) not properly designating objects of scientific or historic value, b) setting aside too much property , and c) using the Act for improper purposes, such as stopping a local coal mining operation and improperly creating wilderness areas. In conducting such a sweeping judicial review, the plaintiffs seek an interpretation of the Antiquities Act that requires a comprehensive examination of the Act's legislative history. The extensive judicial review sought by the plaintiffs is, however, not available in this case.

While there has been some debate among the United States Supreme Court justices as to whether judicial review of executive actions by the President are subject to judicial review at all,[7] recent judgments have indicated the Court's willingness to engage in a narrowly circumsribed form of judicial review. This willingness does not, however, allow judicial review of sufficient scope to assist plaintiffs' cause; long-standing United States Supreme Court precedent has clearly foreclosed the broad review for which plaintiffs contend:

> "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains.

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[7]Justice Scalia's concurrence in *Franklin v. Massachusetts* articulates the most restrictive approach possible to the question of whether judicial review of the President's actions is permissible:

> I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.

505 U.S. 788, 827 (1992). In this formulation, presidential action can be reviewed by seeking an injunction against those bound to enforce a President's directive, but the possibility of direct judicial review of the President's decision, for which plaintiffs contend, is eliminated altogether as inconsistent with "the constitutional tradition of the separation of powers." *Id.* at 828.

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United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940) (quoting *Martin v. Mott*, 12 Wheat. 19, 31-32 (1827)). A grant of discretion to the President to make particular judgments forecloses judicial review of the substance of those judgments altogether:

> [W]here a claim "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Dalton v. Specter, 511 U.S. 462, 474 (1994) (quoting *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919)).

If a Court may not review the President's judgment as to the existence of the facts on which his discretionary judgment is based, the holdings in *Dalton* and *George S. Bush* do leave open one avenue of judicial inquiry. Although judicial review is not available to assess a particular exercise of presidential discretion, a Court may ensure that a president was in fact exercising the authority conferred by the act at issue. Thus, although this Court is without jurisdiction to second-guess the reasons underlying the President's designation of a particular monument, the Court may still inquire into whether the President, when designating this Monument, acted pursuant to the Antiquities Act.

The Antiquities Act offers two principles to guide the President in making a designation under the Act:

> The President of the United States is authorized, in his discretion, to declare by public proclamation . . . objects of historic or scientific interest . . . to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

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16 U.S.C. § 431. The Proclamation of which plaintiffs complain speaks in detail of the Monument's natural and archeological resources and indicates that the designated area is the smallest consistent with the protection of those resources. The language of the Proclamation clearly indicates that the President considered the principles that Congress required him to consider: he used his discretion in designating objects of scientific or historic value, and used his discretion in setting aside the smallest area necessary to protect those objects.

It is evident from the language of the Proclamation that the President exercised the discretion lawfully delegated to him by Congress under the Antiquities Act, and that finding demarcates the outer limit of judicial review. Whether the President's designation best fulfilled the general congressional intention embodied in the Antiquities Act is not a matter for judicial inquiry. This Court declines plaintiffs' invitation to substitute its judgment for that of the President, particularly in an arena in which the congressional intent most clearly manifest is an intention to delegate decision-making to the sound discretion of the President.[8]

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[8]Plaintiffs devote considerable space in their Memorandum in Support of their Motion for Summary Judgment to a discussion of congressional intent and the evidence for it. According to plaintiffs, the legislative history surrounding the passage of the Antiquities Act demonstrates that Congress intended the Act be used to protect man-made objects only, and was not intended to be available as a means for furthering presidential environmental agendas. (Plaintiffs' Combined Memo at 17 *et seq.*) Excerpts from floor debates before the Act's passage are also enlisted to prove that the Act was only intended to allow the President to withdraw very small plots of land to protect the man-made artifacts suitable for designation. *Id.* at 18. This discussion, while no doubt of interest to the historian, is irrelevant to the legal questions before the Court, since the plain language of the Antiquities Act empowers the President to set aside "objects of historic or scientific interest." 16 U.S.C. § 431. The Act does not require that the objects so designated be made by man, and its strictures concerning the size of the area set aside are satisfied when the President declares that he has designated the smallest area compatible with the designated objects' protection. There is no occasion for this Court to determine whether the plaintiffs' interpretation of the congressional debates they quote is correct, since a court generally has recourse to congressional intent in the interpretation of a statute only when the language of a statute is ambiguous. *See Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129,

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Even if broad judicial review of the exercise of the President's discretion is not available, plaintiffs still contend that the procedure which led to the designation fell so far afoul of the requirements of the National Environmental Policy Act (NEPA) as to warrant strip-mining the Monument. Plaintiffs contend that defendants conspired to violate the requirements of NEPA by (nefariously) creating a deceptive paper trail suggesting that it was the President, rather than the DOI, who provided the impetus to create the Grand Staircase Monument. In plaintiffs' formulation of the law, the *sine qua non* of a valid exercise of the President's discretion under the Antiquities Act is that the President proposed the idea to the DOI; the source of the inspiration

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135 (1991) ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed") (citations omitted).

In addition to the plain language of the statute, there is plain language on which this Court may rely in several United States Supreme Court decisions upholding particular designations of natural objects as national monuments under the Antiquities Act. In *Cameron v. United States* the Court quoted from the proclamation in which President Theodore Roosevelt designated the Grand Canyon: "The Grand Canyon, as stated in the Proclamation, 'is an object of unusual scientific interest.'" 252 U.S. 450, 455 (1920). Far from indicating that only man-made objects are suitable for designation, *Cameron* notes approvingly that the Canyon "affords an unexampled field for geologic study [and] is regarded as one of the great natural wonders." *Id.* at 456. The Court in *Cappaert v. United States* explicitly rejected the argument offered by the Plaintiffs before this Court: "Petitioners . . . argue . . . [that] the President may reserve federal lands only to protect archeologic sites. However, the language of the Act which authorizes the President to [designate] national monuments . . . is not so limited. 426 U.S. 128, 142 (1976). In *Cappaert* the Court upheld a designation of a pool inhabited by "a peculiar race of desert fish . . . found nowhere else in the world." *Id.* at 133. The Court has also upheld a designation of islands notable for "fossils . . . and . . . noteworthy examples of ancient volcanism, deposition, and active sea erosion," rather than for human artifacts. *United States v. California* 436 U.S. 32, 34 (1978).

United States v. California addresses not only the President's discretion to designate natural objects but the geographic scope of that discretion as well. Determining whether a designation had reserved only protruding rocks and islets or submerged lands and waters adjacent to them as well is "a question only of Presidential intent, not of Presidential power." *Id.* at 36. In light of this unambiguous United States Supreme Court precedent concerning the Antiquities Act, plaintiffs' reliance on legislative history is clearly misplaced, and their arguments regarding the objects and area of designation untenable.

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for the monument determines whether NEPA and the Administrative Procedures Act (APA) are invoked:

> Although Defendant Gale Norton and the Department of the Interior are required to implement NEPA, defendants correctly assert that presidential actions under the Antiquities Act are not subject to the requirements of NEPA. It is for this reason that it was essential to Defendants to make it appear that the request for consideration of a national monument in Utah came from the President rather than originating, as it did, within the agencies.

(Plaintiffs' Combined Memo ISO Summary Judgment and Opp. Defendants' Motions to Dismiss or for Summary Judgment) (internal citations omitted). If plaintiffs' theory were correct, its evidence that the idea for the Grand Staircase Monument did not originate with the President would be relevant and perhaps sufficient to defeat a motion for summary judgment. Plaintiffs' brief is innocent of any legal authority, however, that would connect the premises that the DOI's final actions are subject to NEPA while the President's actions under the Antiquities Act are not, with the conclusion that it is essential for the idea of a monument to have come from the President. Plaintiffs and defendants are correct that the requirements of NEPA do not apply to the exercise of presidential discretion under the Antiquities Act. To the extent that DOI takes action that could be characterized as final agency action for the purposes of the APA, Plaintiffs are also correct that the requirements of NEPA apply to DOI actions. However, plaintiffs do not cite any legal authority, nor is the Court aware of any, which suggests that these considerations affect the exercise of presidential authority pursuant to the Antiquities Act.[9] Plaintiffs err in

[9]Plaintiffs' best and only case for the requirement that the idea for a monument originate with the President rather than the DOI is a series of emails and letters generated by personnel within the DOI and the CEQ. (Combined Memo ISO Plaintiffs' Motion for Summary Judgment and Opposition to Defendants' Motions to Dismiss or for Summary Judgment at 37 *et seq.*) At best, Plaintiffs have demonstrated that employees within these agencies believed that the idea for the Monument should appear to originate with the President. The machinations of a few agency

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importing a requirement of presidential inspiration into the Antiquities Act's grant of authority to the President.

Since the Antiquities Act is silent as to whether there are limitations on the sources from which the President may draw the inspiration to act, if such a limitation exists it must be found in other statutory provisions, the Constitution, or in the common law. Although Plaintiffs have directed the Court to no statutory authority to suggest that NEPA has any application to the President's actions in this case, it is reasonable to look to NEPA for the source of the requirements for which plaintiffs contend. NEPA cannot be the end of the inquiry, however, for NEPA supplies no private right of action. *See Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). If an agency to which NEPA applies has violated its requirements, an aggrieved party must bring its complaint within the mechanism supplied by the APA. The APA permits judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. In order for a violation of NEPA to be redressable at law, therefore, the violation of which a plaintiff complains must form an element of a final agency action subject to judicial review under the APA.

While the United States Supreme Court has not ruled on the precise question whether an agency's recommendation to the President that he designate a particular monument under the Antiquities Act constitutes final agency action subject to judicial review under the APA, there is good law suggesting the contrary. In order for an agency's action to have that degree of finality

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employees, and the motivations that animated them, however, cannot take the place of some legal authority supporting the plaintiffs' proposition that the President cannot validly exercise his authority under the Antiquities Act unless the idea for a particular monument originates with him.

that is amenable to judicial review under the APA, it must have some immediate effect beyond that of a recommendation: the action is final agency action only when the agency's action itself "has a direct effect on the day-to-day business" of the persons or entities affected by the action. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).

That an agency is incapable of taking "final agency action" in a particular set of circumstances can serve to insulate the agency's preliminary actions (resulting in final *presidential* action) from judicial review under the APA. The United States Supreme Court, in *Franklin v. Massachusetts*, analyzed the President's role in communicating the results of the census to Congress for the purpose of reapportioning seats in the House of Representatives. 505 U.S. 788 (1992). The statutory scheme at issue required the Secretary of Commerce to communicate the results of the census to the President, who then transmitted those results to Congress. 2 U.S.C. §§ 2a(a); 141(b). The fact that the statute *requires* the President to perform only ministerial functions, such as making apportionment calculations according to set formulae, does not transform the Secretary's action in carrying out the census into final agency action for the purposes of review under the APA. Because the statute did not require the President to use the data from the Secretary's report, and because the President is not precluded from directing the Secretary to amend or correct the report, it is the President's actions, and not those of the Secretary, that effect changes to apportionment. *Franklin*, 505 U.S. at 797-9.

Central to the determination whether there exists final agency action subject to review under the APA is the question "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.* at 797. When the statute does not permit the agency to act alone, but rather requires presidential action

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before there is any direct effect on the parties, "there is no determinate agency action to challenge" until the President acts. *Id.* at 799. Even when the presidential action authorized by statute permits the exercise of only limited discretion, and the President will almost certainly rely quite heavily on agency recommendations, the fact that presidential action is required before there will be any effect eliminates the prospect of judicial review under the APA.[10]

Flaws in an agency process leading to a recommendation to the President, that in turn leads to presidential action, do not convert the action of the agency, or that of the President, into action subject to judicial review under the APA. In *Dalton v. Specter* the United States Supreme Court reiterated the rule that a process leading to a recommendation, which the President could then choose to accept or reject, even if flawed, did not permit of judicial review pursuant to the APA, since the recommendation did not constitute final agency action. 511 U.S. 462, 469-70 ("The action that 'will directly affect' the military bases is taken by the President ... Accordingly, the Secretary's and Commission's reports serve 'more like a tentative recommendation than a final and binding determination ... The reports are, 'like the ruling of a subordinate official, not final and therefore not subject to review'") (citations omitted).

That an agency's process may have been flawed is not only irrelevant for purposes of review under the APA, it is also powerless to transform a presidential action based on a flawed agency recommendation into a violation of a statute conferring presidential discretion. The Court

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[10]The Supreme Court summarily dismisses the possibility that the President is an agency within the meaning of the APA. Although the definition of agency in the APA does not explicitly exclude the President, "textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin,* 505 U.S. at 800-801.

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in *Dalton* conceded, *arguendo*, the proposition that judicial review might be available outside the APA for some claims that a President exceeded the authority given by some statutes, but "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President." 511 U.S. 462, 474. While recognizing that some agency processes leading to presidential action are insulated from judicial review by the combination of an absence of final agency action and a grant of discretion to the President, the Court observed that it best fulfils its own constitutional mandate by "withholding judicial relief where Congress has permissibly foreclosed it." *Id.* at 477. Confronted by a statute expressly conferring discretion on the President to make precisely the sort of decision he made in designating the Grand Staircase Monument, this Court must conclude that "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for [judicial] review." *Id.* at 476.

Assuming that plaintiffs are correct, that the original idea for the Monument was entirely the creature of the DOI, the actions of the DOI had no direct and immediate impact on the plaintiffs. It was the President's action, and not the action of the DOI, that had the legal effect of creating the Monument, and the DOI's activities therefore do not constitute final agency action reviewable under the APA.

2. CONSTITUTIONAL CLAIMS

In contrast to the limited judicial review discussed above, judicial review to determine the constitutionality of a President's acts may be appropriate. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 414 (1944); *Franklin v. Massachusetts,* 505 U.S. at 801("As the APA does not expressly allow review of the President's

actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality"). Plaintiffs raise three constitutional claims in this case. First, they assert that the Antiquities Act itself is unconstitutional in violation of the delegation doctrine. In addition they claim that even if the Antiquities Act is constitutional the manner in which it was utilized in creating the Grand Staircase Monument violated the Property Clause and the Spending Clause.

A. Delegation Doctrine and Property Clause

Plaintiffs contend that Congress violated both the delegation doctrine (or perhaps more accurately, the non-delegation doctrine) and the Property Clause by giving the President, under the Antiquities Act, virtually unfettered discretion to regulate and make rules concerning federal property. Neither contention has merit. While it is true that Congress has the express authority under the Constitution's Property Clause to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," it is equally true that Congress may delegate this authority as it deems appropriate. *Yakus v. United States*, 321 U.S. 414 (1944), and any delegation is constitutionally permissible if Congress provides "standards to guide the authorized action such that one reviewing the action could recognize whether the will of Congress has been obeyed." See *Id* at 425-26. [11]

The Antiquities Act sets forth clear standards and limitations. The Act describes the types of objects that can be included in national monuments and a limitation on the size of

[11] The Courts have upheld virtually every congressional delegation of authority made by Congress for the last 100 years. In fact, there have only been two occasions in the 20th and 21st centuries where congressional delegations of authority were deemed unconstitutional. See *A.L.A. Schechter Poultry Corporation v. U.S.*, 55 S.Ct. 837 (1935); *Panama Refining Co. v. Ryan*, 55 S.Ct. 241 (1935).

monuments. See 16 U.S.C. § 431. Although the standards are general, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v. United States*, 500 U.S. 160, 165 (1991). Accordingly, the non-delegation doctrine is not violated, nor is the Property Clause, which has repeatedly been construed as allowing Congress to delegate its authority to the executive and judicial branches, including the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. See also *Tulare County v. Bush*, 306 F.3d 1138 (D.C.Cir. 2002); *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C.Cir.2002); *U.S. v. Garfield County*, 122 F.Supp.2d 1201 (D.Utah, 2000).

B. Spending Clause

Plaintiffs contend that the Grand Staircase Monument included privately owned land, the acquisition of which required the expenditure of federal monies. This claim is without merit. The Antiquities Act requires the President to reserve objects of historic or scientific interest that are situated upon lands owned or controlled by the government of the United States. 16 U.S.C. § 431. The President's Proclamation creating the Grand Staircase Monument clearly distinguishes between land owned or controlled by the Government of the United States and land privately owned or controlled. The Proclamation points out that in creating the Grand Staircase Monument the President solely withdrew lands owned or controlled by the United States Government. (Proclamation, A75) With respect to privately owned or controlled lands the Proclamation provides that "Lands and interests in lands not owned by the United States shall be

reserved as a part of the monument upon acquisition of title thereto by the United States." (Proclamation, A75). The Proclamation clearly indicates that land privately owned or controlled does not pertain to the Monument, but also designates that such private land may become part of the Monument if it is acquired by future action. Nothing in the Proclamation or in the record supports plaintiffs' contention that federal monies were expended to acquire private land. Furthermore, plaintiffs have failed to allege any facts supporting their contention. The Court finds no violation of the Spending Clause.

3. STATUTORY CLAIMS:

A. Wilderness Act

The land within the Grand Staircase Monument amounts to approximately 1.7 million acres. This land, withdrawn by President Clinton, constitutes what he believed to be the requisite amount of land necessary to preserve the designated scientific and historic objects. The withdrawal, according to plaintiffs, constitutes a violation of the Wilderness Act because the President created *de facto* wilderness, which is a power reserved solely to Congress. Plaintiffs' arguments are without merit, finding no support in the language of either the Wilderness Act or the Antiquities Act, or in the case law. In fact, recent case law is to the contrary; in *MSLF v. Bush*, 306 F.3d 1132 (D.C. Cir.2002), the D.C. Circuit Court of Appeals rejected this same argument.

It is undisputed that the President's designation of the Grand Staircase Monument was made pursuant to his authority under the Antiquities Act. All of the land found within the boundaries of the Monument is part of the Monument, regardless whether it could also qualify as wilderness. Though the Antiquities Act and the Wilderness Act may provide overlapping

sources of protection to land that fits within the parameters of both acts, it is beyond dispute that the land reserved within the Grand Staircase Monument is not wilderness and has never been declared to be wilderness pursuant to the Wilderness Act. The fact that some of the acreage within the boundaries of the Grand Staircase Monument is classified as Wilderness Study Areas does not preclude its inclusion in a national monument.

Statutory overlap is not unusual. Numerous statutes provide environmental protection to public land and it is not surprising that some of them overlap. In *MSLF v. Bush*, the D.C. Circuit Court of Appeals recognized several examples of this, observing that in addition to their other purposes, the Wilderness Act, 16 U.S.C. §§ 1131-36 (2000), the Park Service Organic Act, 16 U.S.C. §§ 1-4 (2000), the National Forest Management Act of 1976, Pub.L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.) (2000), FLPMA, 43 U.S.C. § 1701, and the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-29, 531 (2000), all protect scenic values, natural wonders, and wilderness values. See *Bush,* 306 F.3d at 1138. If overlapping sources of protection were not allowed, the Park Service Organic Act would be a repeat offender, as it protects not only wilderness simultaneously with the Wilderness Act, but it also protects endangered species in a manner similar to the Endangered Species Act. As the D.C. Circuit stated, "MSLF misconceives federal laws as not providing overlapping sources of protection." *Id.* at 1138.

Plaintiffs' argument would prevent a President of the United States from including within a national monument not only lands already declared by Congress as "wilderness," a contention which is itself dubious, but also all lands that have previously been classified as Wilderness Study Areas and included in unsuccessful wilderness proposals of some members of the public

and some members of Congress. Plaintiffs' contention is contrary to the purpose of the Antiquities Act, which is to identify and protect important scientific and historic objects and to set aside the necessary surrounding land to insure their continued protection. If plaintiffs' position were sound, a President would be prohibited from including within a national monument any land with the possibility of being declared wilderness, even though such land qualifies as 1) an object of historic or scientific value, or 2) land that must be set aside in order to protect designated objects. Such an outcome would effectively repeal the Antiquities Act in these circumstances, and no such intent to repeal was expressed implicitly or explicitly by Congress in the Wilderness Act. Furthermore, if the land deemed necessary to be included within a national monument includes wilderness areas or Wilderness Study Areas, it appears likely that such lands would continue in their existing state with the attendant restrictions on use. Any other result would be in violation of the Wilderness Act; but nothing in either the Wilderness Act or the Antiquities Act prevents such lands from being part of a national monument.

An underlying theme of plaintiffs' position is a belief that President Clinton and those of his political persuasion were able to (improperly) accomplish through the Antiquities Act what they had been unsuccessful in accomplishing through the Wilderness Act. The proponents of wilderness designation for approximately 900,000 acres of the federal land that ended up within the Grand Staircase Monument had earlier failed to persuade Congress to designate the land as wilderness. Thereafter, however, according to plaintiffs, they achieved most, if not all, of the protection they were seeking for this land when the President included the acreage within the Grand Staircase Monument. Plaintiffs feel this second, successful, effort at protecting the land was unlawful. But they can point to no law that was broken in creating the Grand Staircase

Monument. The President unquestionably had the authority to do what he did under the Antiquities Act.

After briefing was closed in this case, the United States District Court for the District of Wyoming decided *Wyoming v. U.S. Dept. of Agri., et al,* 277 F.Supp.2d 1197 (D.Wyo.2003). Plaintiffs urge this Court to follow the reasoning in that case in which the Department of Agriculture's Roadless Rule was found to be in violation of the Wilderness Act. That case and the instant case, however, have one critical difference that makes the *Wyoming* case inapplicable here. *Wyoming* concerned a rule promulgated solely within and pursuant to the authority of an executive branch department, whereas this case concerns not the rule-making authority of a lower-level department, but of the President himself as specifically designated by an act of Congress. This distinction is critical.

The *Wyoming* case addressed the actions of the U.S. Forest Service and the Clinton Administration which culminated in the so-called "Roadless Rule" being entered as a Record of Decision by the Secretary of Agriculture on January 5, 2001. The Roadless Rule was put on a very fast track, beginning with a directive from President Clinton to the U.S. Forest Service on October 13, 1999, and ending with a fully completed (and NEPA mandated) agency review process only 15 months later. The Roadless Rule specifically prohibited road construction and other uses in inventoried roadless areas of the National Forest System, and by so doing created 58.5 million acres of what the district court referred to as *de facto* wilderness because the protection and treatment of the subject acreage was virtually indistinguishable from wilderness. In addition to finding that the hurried-up process violated NEPA, the district court found that the Roadless Rule violated the Wilderness Act. Central to this latter finding were two main points.

First, as stated above, the Court recognized that the land in question was *de facto* wilderness because a) the land was the same as wilderness in its definition (i.e. "roadless area" is virtually synonymous with "wilderness area"); b) the land had the same use restrictions as wilderness; and c) the land was virtually identical to the land recommended (unsuccessfully) as wilderness by the 1977 RARE II inventory. Second, the district court recognized that one of the primary objectives of the 1964 Wilderness Act was to end the then-existing practice of executive branch agencies, including notably the Forest Service, designating wilderness areas in their sole discretion and as they saw fit, with no direct authority from Congress. As the district court stated:

> To this end, the Wilderness Act removed the Secretary of Agriculture's and the Forest Service's discretion to establish de facto administrative wilderness areas, a practice the executive branch had engaged in for over forty years. Instead, the Wilderness Act places the ultimate responsibility for wilderness designation on Congress. In this regard, the Wilderness Act functions as a "proceed slowly order" until Congress– through the democratic process rather than by administrative fiat– can strike the proper balance between multiple uses and preservation. (citations omitted). *Id* at 1233.

The *Wyoming* court concluded its review of the Wilderness Act by stating "[t]his statutory framework necessarily acts as a limitation on *agency* action." Id at 1233. Notably, the district court did not say "a limitation on *Presidential* action," and certainly nothing in the *Wyoming* opinion suggests the court would have employed the same reasoning to the creation by the President of a national monument under the Antiquities Act.

If the instant case involved actions by the Secretary of the Interior, or the BLM, to use departmental or agency rule-making authority to protect federal lands that had previously failed to achieve wilderness status after having been identified as candidates for such status, and if the protection was virtually identical to the protection afforded wilderness, the outcome here might

be the same as in *Wyoming*. But those are not the facts of this case and that is not the issue before this Court. Here the Court is faced with an entirely different question involving presidential action performed precisely as granted and directed by Congress.

B. NEPA, FLPMA, FACA and the Anti-Deficiency Act

When bringing a lawsuit for violation of statutory law parties must either find language in the statute itself which allows a private right of action, or demonstrate the occurrence of final agency action, which invokes the Court's authority to review the claim under the Administrative Procedure Act. If parties fail to meet these requirements they are precluded from challenging the alleged statutory violation. Plaintiffs allege that in his designation of the Grand Staircase Monument the President and the other defendants violated NEPA, FLPMA, FACA and the Anti-Deficiency Act. These statutes, however, provide no private right of action to an aggrieved party. See *Lujan,* 497 U.S. 871 (1990) (no private right of action available under NEPA and FLPMA); *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F.Supp.2d 20, (D.D.C., July 2002); (Federal Advisory Committee Act creates no private right of action); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed.Cir.1997) (no private right of action available under the Anti-Deficiency Act).

Because none of these statutes provide private rights of action the plaintiffs are left with the insurmountable task in this case of demonstrating final agency action to invoke review under the APA. As stated previously in this Opinion the Supreme Court of the United States has declared that the President is not an agency and cannot be defined as such under the APA. See *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994); *Armstrong v. Bush*, 924 F.2d 282, 288 (D.C.Cir.1991). It follows that actions taken by the

President pursuant to congressionally delegated authority cannot be considered final agency action.

Also as discussed previously in this Opinion, (see pp. 23-28), plaintiffs' contention that the defendant lower-level executive branch officials' recommendations to the President constituted final agency action is also without merit. Recommendations and actions taken by the lower-level executive branch officials encouraging designation of the Grand Staircase Monument constituted nothing more than recommendations and assistance to the President and failed to meet the legal requirements for final agency action. See generally *Franklin*, 505 U.S. at 800. All decisions and actions constituting final action were made by the President in his official capacity. The ultimate decision to create the Grand Staircase Monument rested with, belonged to, and was made by, President Clinton.

C. Executive Order 10355

UAC next argues that the President's designation of the Grand Staircase Monument was invalid because it violated Executive Order 10355 (E.O. 10355). E.O. 10355 was issued by President Harry S. Truman in 1952. It delegated to the Secretary of the Interior "the authority vested in the President by section 1 of the act of June 25, 1910 [the Pickett Act], and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States . . . for public purposes."17 Fed. Reg. 4831 (May 26, 1952). The Secretary of the Interior was also authorized to "modify or revoke withdrawals and reservations of such lands hertofore or hereafter made." *Id.* The Order further directed that "[a]ll orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted to the Division of the Federal Register....

for filing and for publication in the FEDERAL REGISTER." *Id.*

President Truman issued E.O. 10355 by virtue of section 301 of title 3 of the United States Code,[12] which states that the President may delegate "any function which is vested in the President by law" to an agency or department head. It also states "that nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions." 3 U.S.C. § 301. The President must publish such authorization in the Federal Register, but he may place terms, conditions, and limitations on the use of the delegated authority, and he may revoke the delegation "in whole or in part" at any time. *Id.*

Plaintiffs contend that the phrase "authority otherwise vested in him" in E.O. 10355 include the authority to withdraw lands under the Antiquities Act and transfers the President's authority under that Act exclusively to the Secretary of the Interior. For this argument to prevail, several prerequisites must have been fulfilled: 1) E.O. 10355 must have contemplated the transfer of the President's authority under the Antiquities Act, 2) the transfer must have been valid, that is, the underlying statute must allow such a transfer, 3) the transfer must have been complete, meaning that the President retained no authority under the Antiquities Act, and 4) E.O. 10355 must still be in force; i.e. it has not since been repealed or revoked. If any of these conditions has not been met, E.O. 10355 poses no restraint on the President's authority to

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[12] 3 U.S.C. § 301 is a general authorization to delegate presidential functions. Both parties in this case seem to mistakenly believe that E.O. 10355 was issued pursuant to "statutory authority under the Pickett Act" and implied authority under the *Midwest Oil* doctrine. Although it delegated the withdrawal authority under the Pickett Act and the *Midwest Oil* doctrine, the authority to delegate those withdrawal powers came from 3 U.S.C. § 301, not from the withdrawal authority itself.

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designate a national monument under the Antiquities Act.

1. Delegation of Authority under the Antiquities Act

It is questionable whether E.O. 10355 ever delegated the authority granted to the President under the Antiquities Act. Although the language of the Order is general, to construe the Order as granting every withdrawal authority possessed by the President would, in the Court's view, be an overly broad interpretation. E.O. 10355 specifically delegates to the Secretary of the Interior the President's authority under the Pickett Act as well as "the authority otherwise vested in [the President] to withdraw and reserve lands. . ." The broad, almost all-encompassing language of the Order presents an ambiguity and should be interpreted with reference to the entire Order. *See*, *In re Crowell*, 305 F.3d 474, 478 (6th Cir. 2002) (administrative orders delegating authority to agency officials warrant the use of rules of construction similar to those used in statutory interpretation); *U.S. v. Brown*, 348 F.3d 1200, 1209 (10th Cir. 2003) (to determine the meaning of ambiguous language in regulations, a court should look for clues elsewhere in those regulations); *citing*, *Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1005 (10th Cir. 2001) (similar rule for statutory construction).

The defendants argue that "the authority otherwise vested in him" refers to the authority granted to the President under the *Midwest Oil* doctrine,[13] which seems reasonable given that the authority under both the Pickett Act and the *Midwest Oil* doctrine are similar and related. This

[13] The *Midwest Oil* doctrine stems from the Supreme Court case *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). In *Midwest Oil*, President Theodore Roosevelt issued a special Order in anticipation of the Pickett Act withdrawing all public lands which were being used for petroleum exploration. The Order was challenged, but was upheld by the Court. The Court recognized that the President was not acting in a novel manner, but rather was following a precedent that had been set many years before by his predecessors.

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interpretation would also help explain why President Truman did not refer specifically to the Antiquities Act in delegating the President's withdraw authority, a practice to which he seemed accustomed. *See, e.g.*, Exec. Order No. 10250, 16 Fed. Reg. 5385 (June 5 1951), *reprinted as amended in* 3. U.S.C.A. § 301 at 849-51 (1997) (delegating functions to the Secretary of the Interior and specifying more than 15 statutes from which those functions were derived).

Moreover, courts will generally give substantial deference to the President's or the applicable department's interpretation and use of an executive order. *See e.g.*, *Alaniz v. Office of Pers. Mgmt.*, 728 F.2d 1460, 1465 (Fed. Cir. 1984) ("it is recognized that an agency has presumed expertise in interpreting executive orders charged to its administration, and judicial review must accord great deference to the agency's interpretation"), *citing Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801-2, 13 L.Ed.2d 616 (1965).[14] Since E.O. 10355 was issued, land

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[14] *Udall* is particularly relevant to the present dispute. In *Udall*, the Supreme Court upheld the actions of the Secretary of Interior and deferred to the Secretary's interpretation of an executive order granting him authority to act. The Court's language is particularly helpful:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. . . "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,--even when the validity of the practice is the subject of investigation."

Udall, 380 U.S. at 16-17, 85 S.Ct. at 801-2, 13 L.Ed.2d 616, quoting *Midwest Oil*, 236 U.S. at 472-3, 35 S.Ct. at 319, 59 L.Ed. 673.

has been withdrawn on 20 different occasions to create national monuments.[15] Each of these monuments was designated by the President. No national monument has been designated by the Secretary of the Interior pursuant to E.O. 10355 since its enactment in 1952. Such action on the part of both the President and the Secretary of the Interior strongly indicates that neither interpreted E.O. 10355 to include the authority granted under the Antiquities Act. As a result, this Court will not imply such an interpretation.

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[15] Below is a list of national monuments designated pursuant to the Antiquities Act since E.O. 10355 was issued, along with the respective President who exercised the withdrawal authority.

Dwight D. Eisenhower
7/14/56 Edison Laboratory, NJ
1/18/61 Chesapeake and Ohio Canal, MD-WV

John F. Kennedy
5/11/61 Russell Cave, AL
12/28/61 Buck Island Reef, VI

Lyndon B. Johnson
1/20/69 Marble Canyon, AZ

Jimmy Carter
12/1/78 Admiralty Island, AK (Forest Service)
12/1/78 Aniakchak, AK
12/1/78 Becharof, AK
12/1/78 Bering Land Bridge, AK
12/1/78 Cape Krusenstern, AK
12/1/78 Denali, AK
12/1/78 Gates of the Arctic, AK
12/1/78 Kenai Fjords, AK
12/1/78 Kobuk Valley, AK
12/1/78 Lake Clark, AK
12/1/78 Misty Fjords, AK (Forest Service)
12/1/78 Noatak, AK
12/1/78 Wrangell-St. Elias, AK
12/1/78 Yukon-Charley, AK
12/1/78 Yukon Flats, AK

2. Validity of a delegation of Antiquities Act Authority

Even assuming that E.O. 10355 originally contemplated within its language delegating the authority to withdraw land for designating national monuments, "a President may only confer by Executive Order rights that Congress has authorized the President to confer." *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1375 (Fed. Cir. 2000). As the regulations implementing section 204 of FLPMA recognized, E.O. 10355 "conferr[ed] on the Secretary of the Interior all of the *delegable* authority of the President. . ." 43 C.F.R. § 2300.0-3(a)(2) (2004) (emphasis added).

Although 3 U.S.C. § 301 authorizes the President to delegate "any function which is vested in [him] by law" to a department or agency head in the executive branch, delegation of the authority to designate national monuments seems inconsistent with the Antiquities Act itself. The Antiquities Act provides that "[t]he President . . . is authorized, *in his discretion*, to [designate national monuments]." 16 U.S.C. § 431 (2000) (emphasis added). Because Congress only authorized the withdrawal of land for national monuments to be done in the President's discretion, it follows that the President is the only individual who can exercise this authority because only the President can exercise his own discretion. Discretion is defined as "[a] public official's power or right to act in certain circumstances according to personal judgment and conscience." BLACK'S LAW DICTIONARY 479 (7th ed. 1999). It is illogical to believe that the President can delegate his personal judgment and conscience to another.

Moreover, E.O. 10355 authorizes the Secretary of the Interior to "redelegate the authority delegated to him by this order to . . . the Under Secretary of the Interior and [to] the Assistant Secretaries of the Interior." If the Court were to accept UAC's argument, the unfettered

discretion[16] of the President to withdraw public lands for national monuments could potentially be vested in several individuals. Such a result is untenable and clearly beyond what Congress intended when passing the Antiquities Act.

This Court is persuaded that the President, and only the President, may designate National monuments under the Antiquities Act regardless whether President Truman intended to delegate this authority by means of E.O. 10355. The Court finds support for its interpretation in *State of Alaska v. Carter*, 462 F.Supp. 1155, 1159 (D. Alaska 1978) ("The Antiquities Act authorizes the President 'in his discretion' to declare objects that have scientific interest, and are situated upon the public lands, to be national monuments. The Act authorizes only the President to declare these reservations and apparently this authority cannot be delegated." (citations omitted)).

3. Complete delegation of authority

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[16] Although FLPMA imposes numerous requirements on the Secretary of the Interior when withdrawing land, the Antiquities Act was specifically exempted from the reach of FLPMA. In passing FLPMA, the House stated:

> The main authority used by the Executive to make withdrawals is the 'implied' authority of the President recognized by the Supreme Court in U.S. v. Midwest Oil Co. (236 U.S. 459). The bill would repeal this authority and, with certain exceptions, all identified withdrawal authority granted to the President or the Secretary of the Interior. The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments), Alaska Native Claims Settlement Act (native and public-interest withdrawals), the Defense Withdrawal Act of 1958, and Taylor Grazing Act (grazing districts).

H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6203.

Therefore, when the President is creating national monuments pursuant to the Antiquities Act, his discretion would be unquestioned by Congress. If E.O. 10355 did indeed delegate to the Secretary of the Interior the President's Antiquities Act authority, it stands to reason that FLPMA would remain inapplicable to the actions of the Secretary if the Secretary designated a national monument.

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UAC's reliance on E.O. 10355 also assumes that the delegation of authority was complete; that is, that the President relinquished all of his authority under the Antiquities Act to the Secretary of the Interior, forbidding any future action by the President himself pursuant to the Act. This interpretation is suspect where the language of E.O. 10355 does not specifically limit the President nor empower the Secretary of the Interior in such a manner. Additionally, history has shown that presidents after Harry S. Truman continued to designate national monuments using the authority granted by the Antiquities Act.

The Second Circuit faced a similar question in *Clarry v. United States*, 85 F.3d 1041 (2d Cir. 1996). In *Clarry*, former air traffic controllers had been indefinitely barred by President Reagan from employment with the Federal Aviation Administration (FAA) and private entities that contracted with the FAA because of their participation in a strike against the United States. The President ordered the indefinite bar notwithstanding the regulations promulgated by the Office of Personnel Management (OPM), which provided for only a three year ban. The regulations had been issued pursuant to authority delegated to the OPM by the President in two prior executive orders. The Second Circuit found that the President had not specifically delegated to the OPM his statutory authority "to prohibit the employment of individuals who have participated in a strike against the United States." *Id.* at 1048. Because there was no specific delegation, the executive orders did not constitute a complete delegation of the President's authority. Therefore, nothing prevented the President from implementing an indefinite employment bar pursuant to his statutory authority and notwithstanding regulations to the contrary. *Id.*

We are faced with a similar situation. UAC argues that the President may no longer use

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the authority granted to him under the Antiquities Act because of E.O. 10355. However, there is nothing in the language of the Order to indicate that, even if the authority to designate national monuments was delegated to the Secretary of the Interior – which the Court does not find – there was a complete delegation of authority. Without a specific reference to the Antiquities Act, and some indication that the President no longer intended to designate national monuments, this Court cannot conclude that E.O. 10355 constituted a complete delegation of the President's authority. On the contrary, the fact that Presidents continued to exercise Antiquities Act authority indicates that, even if E.O. 10355 was a valid delegation of authority, the authority to withdraw national monuments remained concurrently with the President and did not solely reside with the Secretary of the Interior.

4. Revocation of E.O. 10355

In addition to the previous arguments, defendants contend that FLPMA implicitly repealed E.O. 10355, transferring all authority under the Antiquities Act, if it ever was delegated, back to the President. "The test used to determine whether a statute has been repealed is also used for an executive order. A repeal may be explicit or implicit, [and] [t]he ultimate question is whether repeal of the prior statute [or order] was intended." *Mille Lac Band of Chippewa Indians v. State of Minn.*, 861 F.Supp 784, 829 (D. Minn. 1994) *citing Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976).

Any delegation of authority pursuant to 3 U.S.C. §301 is "revocable at any time by the President in whole or in part." Because Presidents continued to withdraw public land for national monuments after E.O. 10355 was issued, the logical conclusion is that any delegation of authority under the Antiquities Act that E.O. 10355 may have made was implicitly revoked.

Such a revocation is well within the President's authority to partially revoke his own executive order.

Additionally, FLPMA and its attendant regulations also indicate that Congress intended to repeal any delegation authority to designate national monuments to the Secretary of the Interior. Through FLPMA, Congress specifically repealed the Pickett Act, the *Midwest Oil* doctrine and other Acts granting withdrawal authority to the President, thereby extinguishing Presidential authority to withdraw public lands in many circumstances. As a result, Congress also revoked any delegations of authority to other members of the Executive Branch related to the repeal of that authority. Notably, FLPMA specifically excludes the Antiquities Act from its reach and reaffirms the President's authority to designate national monuments. Even more, the regulations seem to indicate that, even if the Secretary of the Interior previously enjoyed authority to designate national monuments, that was no longer the case: "the Secretary of the Interior does not have authority to . . . [m]odify or revoke any withdrawal creating national monuments under the Act of June 8, 1906 (16 U.S.C. 431-433), sometimes referred to as the Antiquities Act." 43 C.F.R. § 2300.0-3(a)(1)(iii). Although the regulations go on to state that, by virtue of E.O. 10355, the Secretary still possesses all the delegable Presidential authority to "make, modify and revoke withdrawals and reservations with respect to lands of the public domain . . .," 43 C.F.R. § 2300.0-3(a)(2), it appears evident that Congress never considered authority under the Antiquities Act as "delegable" in the first place.

Therefore, any effect E.O. 10355 may have had on the President's authority to withdraw land for national monuments under the Antiquities Act has been repealed, both by Presidential action and Congressional legislation.

5. Private Right of Action to Enforce Executive Orders

Finally, even if this Court were to accept UAC's argument that because of E.O. 10355 the Secretary of the Interior is currently the only individual invested with authority to withdraw public land to create national monuments pursuant to the Antiquities Act, the Court questions whether UAC or a court can enforce E.O. 10355. It is well settled that "[g]enerally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders." *Zhang v. Slattery*, 55 F.3d 732, 747 (2nd Cir. 1995) (quotations and citations omitted). Furthermore, "to assert a judicially enforceable private cause of action under an executive order, a plaintiff must show (1) that the President issued the order pursuant to a statutory mandate or delegation of authority from Congress, and (2) that the Order's terms and purpose evidenced an intent [on the part of the President] to create a private right of action." *Centolla v. Potter*, 183 F.Supp.2d 403, 413 (D. Mass. 2002), citing *Indep. Meat Packers Ass'n. v. Butz*, 526 F.2d 228, 234-35 (8th Cir. 1975). E.O. 10355 fails on both counts to create a private right of action.

First, E.O. 10355 was not issued pursuant to a "statutory mandate" from Congress and therefore does not have the effect of law. Were this so, there would be some language in the Antiquities Act itself directing the President to delegate or otherwise employ the authority granted to him. There is no such mandate from Congress. Rather, President Truman resorted to 3 U.S.C. § 301 as authority for E.O. 10355, which grants broad delegation authority to the President. This authority seems managerial in nature, giving the President the ability to direct and delegate the affairs of the executive branch in a manner he deems best. Because this was an internal delegation in the executive branch, revokable at any time by the President, E.O. 10355 does not have the force or effect of law.

Second, there is nothing in E.O. 10355 itself indicating that President Truman intended to create a private right of action to enforce compliance with the order. In the absence of such an intent on the face of the order, this Court will not imply one.

UAC's argument that E.O. 10355 forbids the President from withdrawing public lands for national monuments fails on many levels, any one of which is sufficient for this Court to hold that E.O. 10355 did not prohibit the President from designating the Grand Staircase Monument under the Antiquities Act.

CONCLUSION

For the foregoing reasons, defendants' Motion to Dismiss and in the alternative for Summary Judgment is GRANTED; plaintiffs' Motions for Summary Judgment are DENIED in their entirety. IT IS SO ORDERED.

Dated this 19th day of April, 2004.

Dee Benson
United States District Judge

blk

United States District Court
for the
District of Utah
April 19, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:97-cv-00479

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National Monuments and National Conservation Areas: A Comparison in Light of the Bears Ears Proposal

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At over 7,800 square-miles, San Juan County, Utah is the largest county in the state. The federal government is the largest landowner in the county, managing 61.4-percent of the land. Native Americans — primarily the Navajo Nation — control 25.2-percent of the land, with state, and private and local government controlling just 5.3- and 8.1-percent of the land, respectively.[1] San Juan County is both one of the least populous counties in the state, and the county with the lowest per-capita income.[2] The county's economic challenges are juxtaposed against invaluable natural resources. The county includes a rich and diverse landscape, rising 7,000 feet from the arid lands near the San Juan River up to the snowcapped Abajo Mountains. Blessed with historic, archaeological, and environmental resources, the region has tremendous significance to those who live there. A broad consensus has emerged favoring additional protection for the area, but the form that protection will take is a matter of intense debate.

As part of the Utah Public Lands Initiative (PLI), Congressmen Rob Bishop and Jason Chaffetz propose to protect the region via two adjacent National Conservation Areas (NCA): the Bears Ears NCA (857,603 acres), and the Indian Creek NCA (434,354 acres).[3] In contrast, the Bears Ears Intertribal Coalition, a group of five Native American tribes, urges President Obama to proclaim a Bears Ears National Monument spanning 1.9 million acres, which would include the land from the two NCAs noted above plus an additional 608,000 culturally-sensitive acres.[4]

This paper discusses both protective mechanisms: a congressional NCA designation, and a presidential national monument proclamation. Our aim is to compare the two as they relate to this common landscape, and to inform the public's understanding of each. While both mechanisms are sufficiently flexible to address the wide-ranging issues raised by various constituents, there are critical differences between the proposals regarding the size of the protected area and the management requirements that would apply.

We do not address the PLI in its entirety because, at 215 pages, the PLI tackles wide-ranging public land management issues across a much larger geographic area than can be analyzed fully here. Rather, our analysis focuses solely on the PLI's plans for the Bears Ears region. We also caution that neither proposal has been approved, and significant changes are likely to occur before protections are bestowed. Indeed, we encourage the decision makers to incorporate the best elements of both proposals into the final decision, whether that turns out to be an NCA or a national monument designation. Finally, we point out that an NCA or national monument designation would mark the beginning of a planning process, not the final resolution of all complex management questions. The managing agencies must flesh out many details in the plan(s), which will have at least as much impact on area management as the designation that is ultimately selected.

We begin by reviewing the Antiquities Act and the Obama administration's monument proclamations, and with an overview of existing NCAs and how they address management issues. We then discuss the monument proposal from the Inter-Tribal Coalition and the two NCA proposals from the PLI. Although this paper focuses heavily on Southeastern Utah, the lessons learned here apply across the country, as interest in designating new monuments and NCAs will almost certainly continue and the questions addressed here will arise again.

I. National Monuments

Congress enacted the Antiquities Act of 1906[5] in response to concerns over looting and desecration of Native American sites in the Southwestern United States.[6] In passing the Antiquities Act, Congress expressly delegated to the President of the United States[7] the unilateral and discretionary authority to:

> [D]eclare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments. .

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> . . The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[8]

There are currently 122 national monuments spread across twenty-nine states, the District of Columbia, and several U.S Territories. Fifteen of the last nineteen Presidents, Republicans and Democrats alike, have utilized this authority. Some of our most iconic national parks began as national monuments, including the Grand Canyon, Arches, and Grand Teton.

Monument proclamations apply only to federal land.[9] As the proclamation for every recent national monument makes clear, monuments are established "subject to valid existing rights."[10] This includes existing water rights, which are not affected by a monument designation.[11] Judicial opinions upholding at least eight monument designations all affirm the President's discretion to determine what is suitably "historic" or "scientific."[12] Similarly, while the Act restricts presidential designations to the "smallest area compatible with [ ] proper care and management,"[13] the courts have uniformly refused to second guess a President's determination of appropriate monument size.[14] In a case involving the Grand Staircase-Escalante National Monument, the Utah Federal District Court ruled that its authority to review presidential monument proclamations is limited to ascertaining only whether the President invoked delegated powers under the Antiquities Act, and that the court cannot review the substance of that invocation.[15] Courts also reject contentions that Presidential authority is limited to rare and discrete man-made objects such as prehistoric ruins,[16] or that ecosystem conservation and environmentally-inspired protection exceeds the President's delegated authority.[17]

This breadth of authority granted by Congress and affirmed by the courts affords Presidents extraordinary latitude to incorporate place-specific language in national monument proclamations. President Obama, for example, recognized the importance of water to Westerners when, in creating the Basin and Range National Monument in Nevada, he stated that the monument neither created new federal water rights nor altered existing state-issued water rights.[18] In creating the Browns Canyon National Monument in Colorado, he expressly recognized state "jurisdiction and authority with respect to fish and wildlife management."[19] In creating the Río Grande Del Norte National Monument in New Mexico, he protected utility line rights-of-way within the monument.[20] Similarly, the proclamation for the Basin and Range National Monument states that, "nothing in this proclamation shall be deemed to affect authorizations for livestock grazing, or administration thereof, on federal lands within the monument. Livestock grazing within the monument shall continue to be governed by laws and regulations other than this proclamation."[21]

Recent national monument proclamations also invariably require managers to create a management plan in consultation with state, local, and tribal governments. For example, in his Berryessa Snow Mountain National Monument proclamation, President Obama directed monument managers to "provide for public involvement in the development of the management plan including, but not limited to, consultation with tribal, State, and local governments. In the development and implementation of the management plan, [federal agencies] shall maximize opportunities . . . for shared resources, operational efficiency, and cooperation."[22]

Questions regarding Native American access and use of a national monument are of particular importance in Southeastern Utah. Monument designations do not, as some have claimed, impose additional limits on American Indian access or use. To do so would conflict with the policy contained in the American Indian Religious Freedom Act, which declares that:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[23]

Language specifically protecting Native Americans' rights to access and use national monuments is included in all Obama-era proclamations involving significant areas of public land. Indeed, nine of the most recent proclamations contain substantively identical language: "The Secretaries shall, to the maximum extent permitted by law and in consultation with Indian tribes, ensure the protection of Indian sacred sites and traditional cultural properties in the monument and provide access by members of Indian tribes for traditional cultural and customary uses."[24]

Recent monument proclamations also specifically address Native American use of forest products, firewood, and medicinal plants, where those issues have regional significance. The proclamation for the San Gabriel Mountains protects tribal members' access to the monument for "traditional cultural, spiritual, and tree and forest product-, food-, and medicine-gathering purposes."[25] The proclamation for the Río Grande Del Norte National Monument "ensure[s] the protection of religious and cultural sites in the monument and provide[s] access to the sites by members of Indian tribes for traditional cultural and customary uses." Furthermore, "[n]othing in this proclamation shall be construed to preclude the traditional collection of firewood and piñon nuts in the monument for personal non-commercial use consistent with the purposes of this proclamation."[26] The Chimney Rock National Monument proclamation states that the management plan "will protect and preserve access by tribal members for traditional cultural, spiritual, and food- and medicine-gathering purposes, consistent with the purposes of the monument, to the maximum extent permitted by law.[27]

In sum, in enacting the Antiquities Act, Congress expressly delegated to the President the power to designate new national monuments. Without exception, courts have upheld this power and have deferred to the President with respect to the management of newly created monuments. It is common for Presidents to include specific provisions addressing management challenges that are unique to the areas designated, and there is no evidence to suggest that any new monument designation would further restrict Native American access to or use of culturally significant resources. Indeed, recent monument proclamations evidence a clear trend towards expressly recognizing these rights.

II. National Conservation Areas

The power to designate an NCA resides exclusively with Congress. Congress created the first NCA in 1970, and today there are sixteen NCAs in eight states. Congress has even broader authority to address management concerns than is available to the President under the Antiquities Act. Congress may, for instance, incorporate wilderness areas or wild and scenic river designations into statutes creating an NCA, as the power to designate these protected areas resides exclusively with Congress and has not been delegated to the President.

Management direction for each NCA is set forth in the legislation establishing the area. While this gives Congress flexibility to tailor management to local needs, it also complicates efforts to identify themes in NCA management. However, just as we can look to national monument proclamations to identify how a new monument would likely be managed, we can also look to existing NCA legislation to identify trends in NCA management.

Legislation creating an NCA commonly states as its statutory purpose: "to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources."[28] Minor variations may occur to reflect resources that are unique to each NCA.[29] The statutes creating NCAs also invariably include language regarding authorized uses. Early statutes creating NCAs were often more detailed and specific. The Kings Ranch NCA, for example, which was created in 1970, allows uses:

> [I]ncluding but not limited to . . . scenic enjoyment, hunting, fishing, hiking, riding, camping, picnicking, boating and swimming, all uses of water resources, watershed management, production of timber and other forest producers,

> grazing and other agricultural uses, fish and wildlife management, mining, preservation of ecological balance, scientific study, occupancy and access.[30]

Statutes creating newer NCAs typically state that federal land managers will allow only uses that "would further the purposes for which the Conservation Area is established,"[31] as determined by the Secretary of the managing agency. The treatment of water rights has also evolved under NCA designations. Although early NCAs did not explicitly address water rights,[32] or include a reservation of water sufficient to fulfill the purposes of the NCA,[33] two of the four most recent NCAs include provisions stating that the legislation does not create an express or implied water right,[34] while two others are silent on the issue.[35]

Congress, in designating NCAs, appears to be trending towards more specific protection. Early NCA legislation rarely included discussion of vehicle use, but recent NCAs commonly include statements that limit off-road motorized vehicle use to administrative or emergency response purposes.[36] Similarly, earlier NCA legislation often ignored livestock grazing, while more recent NCA legislation generally includes language addressing the practice. For instance, the 2009 Beaver Dam Wash NCA legislation provides that any grazing established prior to the day of the act could continue "subject to such reasonable regulations, policies, and practices as the Secretary considers necessary."[37]

Native American access and use has rarely been addressed in NCA legislation. The only mention comes from the El Malpais NCA bill, which states:

> [T]he Secretary shall assure nonexclusive access to the monument . . . by Indian people for traditional cultural and religious purposes, including the harvesting of pine nuts. Such access shall be consistent with the purpose and intent of the American Indian Religious Freedom Act. . . . [T]he Secretary, upon the request of an appropriate Indian tribe, may from time to time temporarily close to general public use one or more specific portions of the monument or the conservation area in order to protect the privacy of religious activities in such areas by Indian people.[38]

None of the statutes creating an NCA includes language regarding the use of firewood, apart from the El Malpais NCA, which prohibits the commercial sale of dead or green wood.[39]

Management cooperation requirements vary across legislation, but some common themes are noteworthy. Most NCAs either authorize federal land managers to "enter into cooperative management agreements with appropriate state and local agencies,"[40] or direct federal managers to consult with appropriate state, tribal, and local governmental entities, and members of the public.[41]

In sum, Congress has tremendous latitude to include provisions addressing local issues and concerns in legislation creating NCAs. As with National Monuments, provisions in the statutes creating NCAs tend to be somewhat general in tone, requiring more detailed management definition as part of subsequent planning documents.

III. Comparing the Two Proposals

The text that follows identifies and assesses key differences between the Inter-Tribal Coalition and PLI proposals. A more complete summary of the competing proposals is set forth in a Table at the end of this paper, and both proposals are depicted in Figure 1.

A. The Bears Ears National Monument Proposal

The Bears Ears Inter-Tribal Coalition is comprised of the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Pueblo of Zuni. The Coalition has asked President Obama to designate a Bears Ears National Monument, as shown below.[42] Twenty-six additional

tribal governments support the coalition proposal.[43] Though there is no guarantee that the President will designate the monument, or that a designation would match the proposal, we anticipate that a National Monument would combine details from the proposal and many of the standard provisions discussed above.

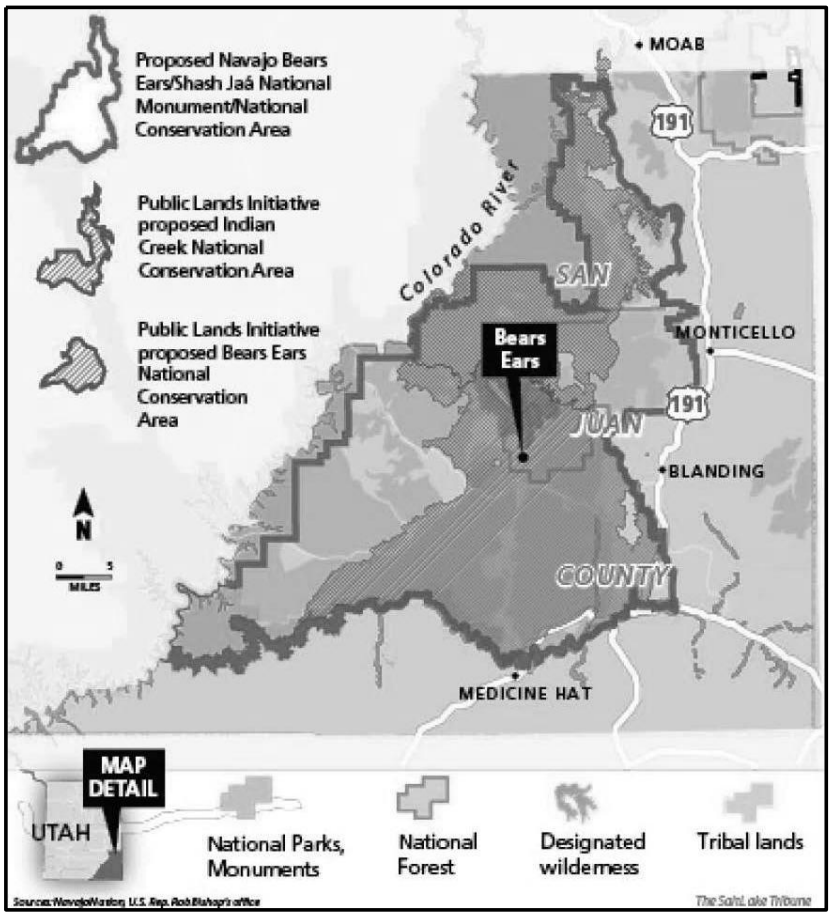


Figure 1 -- Monument & NCA Proposals

The Inter-Tribal Coalition's proposal advocates for greater tribal involvement in monument management.[44] As shown in Figure 2, the Coalition's proposal calls for an eight-member management commission comprised of one representative from each of the five coalition tribes, plus one representative from each federal agency that currently administers lands within the proposed monument: the Forest Service, the BLM, and the National Park Service. The commission would collaborate on all management decisions. If commission members fail to agree, the agencies and tribes would proceed to mediation; if mediation fails, final decision-making authority remains with either the Secretary of the Interior or the Secretary of Agriculture, depending on land ownership.[45] While the proposal calls for an unprecedented level of tribal involvement, the proposal also guarantees that no decision would be made over the objection of the Secretaries and that final decision-making authority would remain with the federal government. Notably, while the Intertribal Coalition's proposal creates a commission to address federal and tribal concerns, other stakeholders as well as state and local governments, lack comparable representation and must rely on public input processes enshrined in the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act

(FLPMA) existing laws.[46]

Under the Coalition proposal, key resource management issues within the monument would be addressed in the presidential proclamation, while subsequent planning documents would address implementation. The Coalition recommends that the following provisions be included in the proclamation itself:

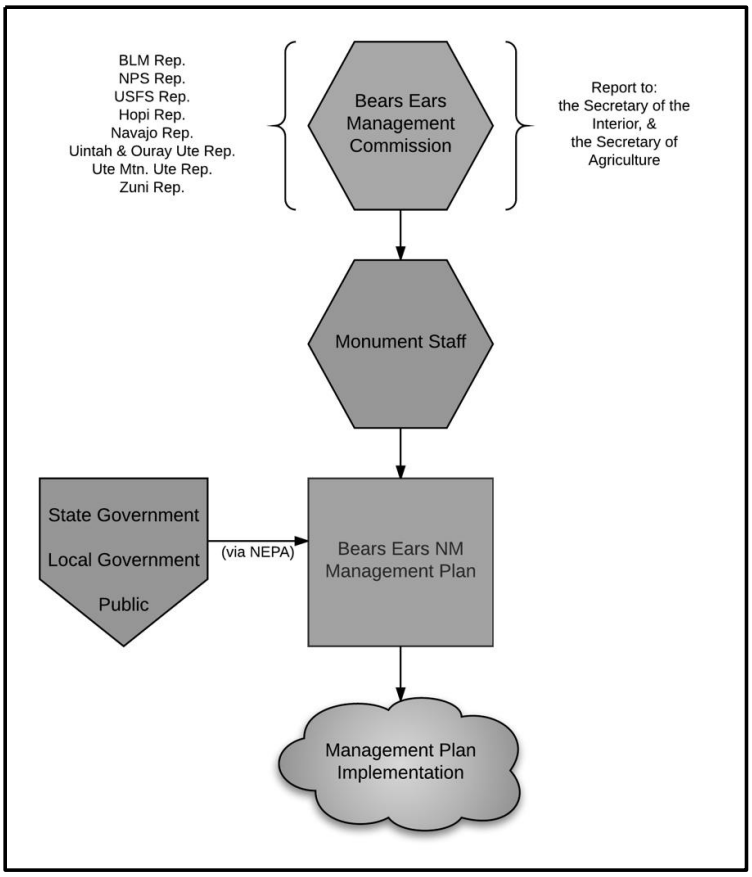


Figure 2 – Proposed National Monument Management

- A permanent mineral withdrawal for future location and leasing, of all lands within the monument.[47]
- A permanent withdrawal from all other forms of leasing, selection, sale, exchange, or disposition, other than those exchanges that further the purposes of the monument.
- The management plan should include a transportation plan designating the roads and trails available for motorized or non-motorized vehicle uses. Motorized and mechanized vehicle use should be permitted only on designated roads and trails consistent with the purposes of the monument.
- State of Utah and Ute Mountain Ute hunting and fishing laws should continue to apply within the monument.
- The Secretaries should be directed, upon request of the State of Utah, to negotiate with the state for an exchange of the state inholdings within the monument.
- The proclamation should provide for collaborative management.
- The management plan should, to the maximum extent permitted by law, ensure protection of Native American sacred and cultural sites and provide access to those sites by members of Indian tribes for traditional and cultural uses, including gathering of minerals, medicines, berries and other vegetation, forest products, and firewood.
- Grazing under existing permits or leases should continue under existing law.
- Firewood gathering should continue under current management prescriptions and then be subject to such provisions as adopted in the management plan.

The proposed monument would include approximately 157,000 acres of state lands,[48] and the Coalition proposes that the federal government negotiate an exchange of state lands within the monument for developable federal lands outside of the monument.[49] The Coalition also proposes standard proclamation provisions protecting valid existing rights, Tribal rights, the rights of inholders, and existing water rights.[50] Remaining issues, including the implementation

of these provisions, would be resolved during the monument planning process. With the exception of the proposed eight-member management commission and co-management, these provisions basically mirror the content contained in other Obama administration monument proclamations.

B. The Bears Ears and Indian Creek NCA Proposal

The PLI proposes two new NCAs in the Bears Ears area — an 857,603-acre Bears Ears NCA, and a 434,354-acre Indian Creek NCA. As seen in Figure 1, the proposed NCAs are contiguous but subject to different management requirements, and the NCAs overlap with much of the Inter-Tribal Coalition's proposed National Monument. The two proposed NCAs are addressed in turn, and summarized in Figure 3 as well as the table at the end of this paper.

Like the Inter-Tribal Coalition's proposal, the PLI recognizes that Utah has significant land holdings within areas that would be impacted by NCA designations, and like the Coalition's proposal, the PLI would allow the state to exchange inholdings for developable lands elsewhere in the state. Unlike the Coalition's proposal, which calls for a negotiated exchange, the PLI provides that if Utah offers to convey its inholdings to the U.S., the Secretary "shall," subject to certain conditions, "accept the offer," and "convey to the State all right, title, and interest" in statutorily specified federal lands to the state.[51] Negotiations and parcel value equalization are not required, and environmental and public review would be streamlined.[52]

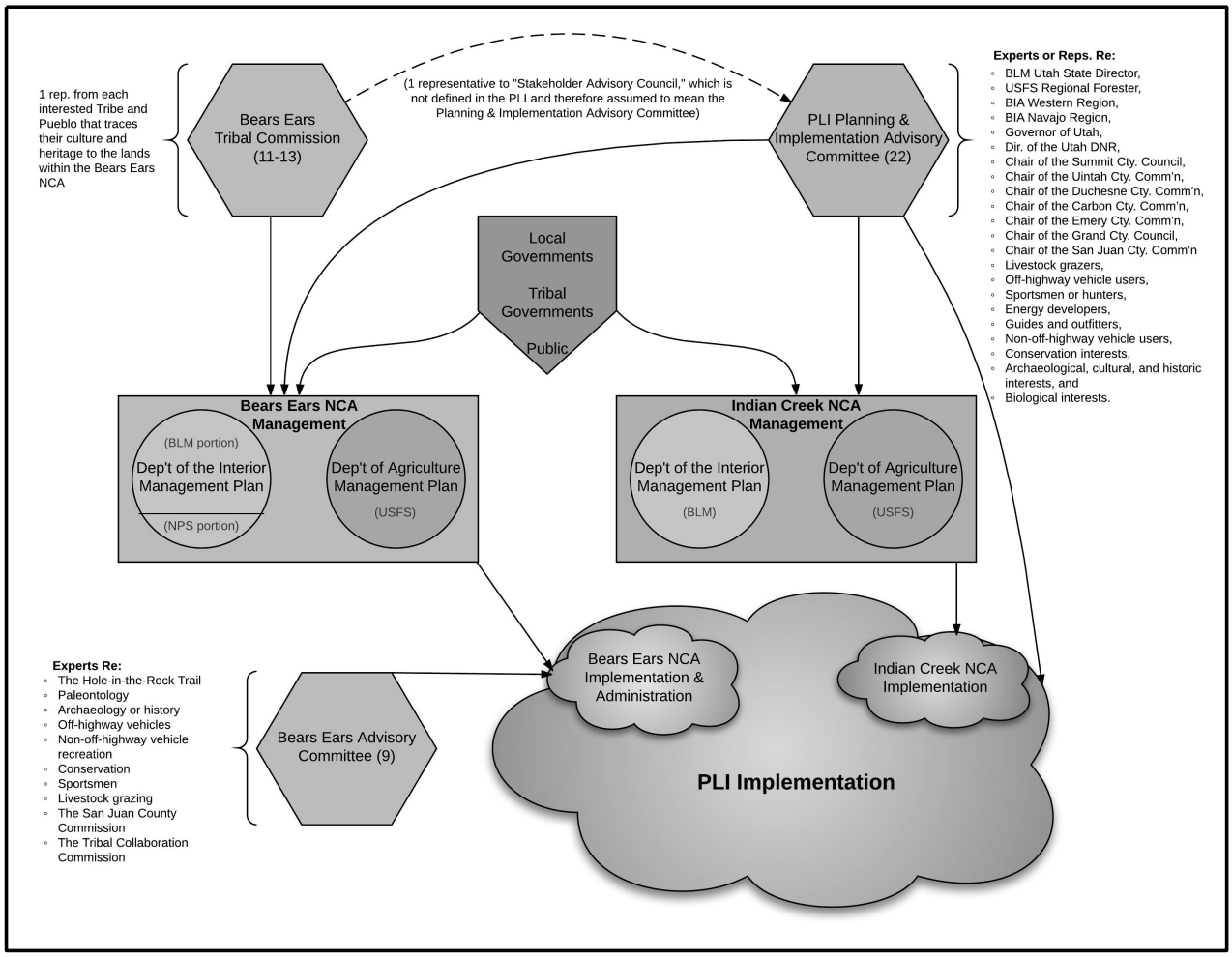


Figure 3 -- Proposed NCA Management

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The PLI would also designate ten new or expanded wilderness areas that overlap portions of the two proposed NCAs. Narrow exceptions aside, roads, motorized vehicles, and mechanized equipment are all normally prohibited within wilderness areas.[53] Under the PLI, these prohibitions would remain in place, except that motorized access and road maintenance would be allowed as needed to guarantee the continued viability of water resource facilities that exist or which may be necessary in the future,[54] and as needed for firefighting and other purposes.[55] Most of the proposed wilderness areas reflect existing wilderness study areas, which are already subject to a statutory mandate not to impair their wilderness character.[56] All other proposed new wilderness areas on BLM lands are within areas inventoried as possessing wilderness character.[57] Two new wilderness areas would be designated within the Manti-La Sal National Forest. Additionally, under the PLI, approximately seventeen miles of the San Juan River would be protected under the Wild and Scenic Rivers Act.[58] This segment reflects a portion of the southern boundary of the proposed national monument.

The Bears Ears NCA Proposal

Under the PLI, the Bears Ears NCA would be managed in accordance with six objectives, which are:

- Protect, conserve, and enhance the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources.
- Maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public.
- Recognize and maintain historic uses.
- Provide for traditional access by indigenous persons for culturally significant subsistence, including but not limited to traditional gathering, wood cutting, hunting, and cultural and religious uses.
- Protect, preserve and minimize disturbance to Native American archaeological sites, including human remains, from permitted uses of Bears Ears consistent with the Native American Graves Repatriation and Protection Act, the National Historic Preservation Act, and the Utah State Antiquities Act.
- Integrate Native American traditional ecological knowledge; improve social, economic, and ecological sustainability in accordance with U.S. Forest Service planning regulations.[59]

Like national monument proclamations, the PLI requires preparation of an NCA management plan.[60] Within two years, "[t]he relevant Secretary shall prepare the management plan in consultation and coordination with local and tribal governments, the public, and the [PLI] Planning and Implementation Advisory Committee."[61] The proposed NCA includes land currently managed by the National Park Service and the BLM, both of which are agencies within the Department of the Interior, as well as lands managed by the U.S. Forest Service, which is part of the Department of Agriculture. It is not clear whether the Secretaries overseeing these two Departments would be required to integrate their planning efforts, as is the case under the Inter-Tribal Coalition proposal.

The PLI explicitly provides for tribal involvement in certain aspects of planning. Under the PLI, the Secretary of the Interior must designate as cooperating agencies for the purpose of completing the Environmental Impact Statement, which is an essential step in the creation of an NCA management plan, any "interested Tribes and Pueblos that trace their culture and heritage to the lands within the Bears Ears [NCA]."[62] As BLM regulations require preparation of a combined plan and plan environmental impact statement,[63] cooperating Tribes and Pueblos would presumably also have a role in plan development. However, cooperating agency status under the PLI applies only to the Department of the Interior, so Tribes and Pueblos may not be

statutorily entitled to cooperating agency status in planning for the portion of the NCA that would be administered by the U.S. Forest Service.

The PLI also creates an independent "Bears Ears Advisory Committee" to advise the Secretary of the Interior with respect to management plan implementation and NCA administration.[64] The committee would be made up of one representative with expertise in each of the following areas:

- The Hole-in-the-Rock Trail
- Paleontology
- Archaeology or history
- Off-highway vehicles
- Non-off-highway vehicle recreation
- Conservation
- Sportsmen
- Livestock grazing
- The San Juan County Commission
- The Tribal Collaboration Commission[65]

As this committee is only explicitly charged with advising the Department of the Interior, it is unclear whether the committee would also advise the Forest Service on planning matters.

Additionally, the PLI would create a "PLI Planning and Implementation Advisory Committee," to advise the Secretaries of the Interior and Agriculture on how to implement the PLI, and on "policies or programs that encourage coordination among the public, local elected officials, or public lands stakeholders, and the State, tribes, or the Federal Government."[66] There would be twenty-two members of the PLI Advisory Committee, which would be drawn from two groups. Thirteen individuals would represent government entities and agencies:

- The Utah State Director of the BLM,
- The Regional Forester of Region 4 of the United States Forest Service,
- A representative of the Bureau of Indian Affairs Western Region,
- A representative of the Bureau of Indian Affairs Navajo Region,
- The Governor of the State of Utah,
- The Director of the Utah Department of Natural Resources,
- The Chairperson of the Summit County Council,
- The Chairperson of the Uintah County Commission,
- The Chairperson of the Duchesne County Commission,
- The Chairperson of the Carbon County Commission,
- The Chairperson of the Emery County Commission,
- The Chairperson of the Grand County Council, and
- The Chairperson of the San Juan County Commission.[67]

Nine Utah residents would also be appointed to represent:

- Livestock grazers,
- Off-highway vehicle users,
- Sportsmen or hunters,
- Energy developers,
- Guides and outfitters,
- Non-off-highway vehicle users,
- Conservation interests,
- Archaeological, cultural, and historic interests,
- Biological interests.[68]

In sum, the PLI proposes to create three different advisory bodies, each of which would involve nine to twenty-two members, have overlapping responsibilities, and sometimes overlapping membership. This is far more complicated than the management structure envisioned under the Inter-Tribal Coalition proposal. Aside from the Bears Ears Tribal Commission, advisory bodies under the PLI also give far more authority to state and local governments than is true for the Inter-Tribal Coalition proposal, which makes no provision for state or local involvement.

The section of the PLI that would designate the Bears Ears NCA does not address mineral or land disposal withdrawals, livestock grazing, wildlife management, vehicle use, or water rights. Each of these issues is addressed under the Tribal Coalition's proposal and for the eleven other NCAs proposed under the PLI (including the proposed Indian Creek NCA discussed below). While this appears to be a drafting oversight, the omission could pose significant management challenges if not addressed through bill amendments.

The Indian Creek NCA Proposal

The proposed Indian Creek NCA is located north of and adjacent to the proposed Bears Ears NCA. While the PLI discusses the proposed Bears Ears NCA in a standalone section, the proposed Indian Creek NCA is identified in a section creating eleven new NCAs. The management directives listed in that section would apply to all eleven NCAs, and include to:

- Protect, conserve, and enhance the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources of the NCA,
- Maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public in the NCA, and
- Recognize and maintain historic uses of the NCA.[69]

Tribes and Pueblos would lack the substantive role in management plan development and implementation for the proposed Indian Creek NCA that they would have with respect to the proposed Bears Ears NCA. See Figure 3. The proposed Indian Creek NCA also lacks the explicit protection of Native American access and use that is included in the proposed Bears Ears NCA.

Furthermore, the PLI proposes that within the Indian Creek NCA, livestock grazing levels should be maintained at the "approximate stocking levels prescribed in the grazing permit that existed on January 1, 2016."[70] This potentially limits the ability to reduce grazing in response to wildfire, drought, or wildlife needs. No such requirements are found in the proposed Bears Ears NCA or the Inter-Tribal Coalition's National Monument proposal. And while the PLI recognizes continued state primacy with respect to wildlife and water rights management within the proposed Indian Creek NCA,[71] no such provision applies to the proposed Bears Ears NCA.

However, the proposed Indian Creek NCA is more protective of certain resources and uses than the proposed Bears Ears NCA. The Indian Creek NCA would be withdrawn from mineral development and disposal under applicable public lands laws.[72] No such withdrawal applies with respect to the Bears Ears NCA. Vehicle use within the Indian Creek NCA would be limited to designated routes.[73] Again, the Bears Ears NCA is not subject to similar protections.

Some of these differences may reflect drafting oversights. The Bears Ears NCA is proposed in Division G, Title I of the PLI, while the eleven other NCAs are proposed together in Division A, Title II of the bill. The bill's drafters may have simply neglected to extend intended protections to lands in the later section. It is also possible that the PLI's drafters assumed that these substantive issues could be resolved, with greater Tribal input, through the management plan development process applicable to the proposed Bears Ears NCA. Either way, the striking difference in approach would benefit from clarification.

V. Conclusion

By enacting the Antiquities Act of 1906, Congress expressly granted the President the discretionary authority to set aside certain scientifically and historically important lands. Given this authority, national monument proclamations provide the flexibility to address issues unique to each landscape. Having evolved over time, today monument proclamations typically include both an express recognition of valid existing rights and state jurisdiction over water and wildlife,

and an express recognition of Native Americans' rights to access and utilize the landscape. They also include procedural direction requiring federal land managers to collaborate with state, tribal, and local governments as well as specific direction regarding resource protection. In light of these evolutionary changes, monument designations today often look quite different from those of a century ago. Congressional authority to designate and design National Conservation Areas is even broader than that available to the President under the Antiquities Act, and sufficiently flexible to address the unique challenges of a particular landscape. Thus, the critical distinction between an NCA and a national monument, aside from which branch of government undertakes the designation, involves the content they choose to instill in that designation.

In this case, the protections proposed under the PLI and by the Bears Ears Inter-Tribal Coalition differ noticeably. The Inter-Tribal Coalition's proposal is considerably larger, protecting upwards of 608,000 additional acres. While both proposals would require development of a detailed management plan and create opportunities for stakeholder involvement, they would do so in very different ways. The Inter-Tribal Coalition's proposal involves an eight-member federal-tribal management commission that would oversee management of a single management unit. Other stakeholders as well as state and local government would need to rely on consultation and cooperation requirements contained in other laws. In contrast, the PLI proposes to create two separate management units and three advisory bodies, involving up to forty-four total members.[74] Each of these entities would assume different roles and responsibilities, and each would engage in different manners and at different times during the planning or implementation process. And while the Intertribal-Coalition's proposal emphasizes tribal input, the PLI weighs heavily in favor of state and local government involvement. Further complicating matters under the PLI, it does not appear that the three federal agencies managing lands within the proposed NCA would be required to integrate management planning or administration. With three separate groups and up to forty-four representatives advising three federal agencies on wide-ranging issues, the PLI's management process has the potential to become unwieldy.

In terms of management, the Inter-Tribal Coalition's proposal would limit disposal and mineral development while protecting existing uses and state authority over water and wildlife. Under the PLI, Native Americans would have a heightened voice in managing the Bears Ears NCA, but no comparable role with respect to the Indian Creek NCA. The Indian Creek NCA would be subject to more protections like those contained in the Inter-Tribal Coalition proposal, but those protections would not extend to the Bears Ears NCA. Whether that reflects a drafting oversight or a decision to defer protections to management plan development is unclear.

Critically, both proposals recognize that any federal designation would capture thousands of acres of state trust lands, and that those lands should be exchanged for federal lands that are appropriate for development outside of the Bears Ears region. Where the Inter-Tribal Coalition's proposal calls for a post-designation negotiated exchange, the PLI dictates which lands would be exchanged. Although the PLI process may be more expedient, it would leave little room for public input and lacks a requirement, implicit in the Intertribal-Coalition proposal, that the parcels exchanged be of even approximately comparable value.

In sum, there are striking differences between the Inter-Tribal Coalition National Monument proposal and the pending PLI bill — and there are features to be lauded in both. Given the legal authority available to both the President and Congress, both mechanisms could produce comparable protections, and the best elements of the competing proposals should be incorporated into the final designation, whatever form that takes. While their visions may diverge, we must remember that both Native Americans and San Juan County residents have strong ties to the public lands at issue, and that all agree on the need for increased protection for this important landscape. Whatever the mechanism, these key stakeholders' concerns should be heard when defining the future of a landscape that helps define them.

	Bears Ears National Monument	*Bears Ears National Conservation Area*	*Indian Creek National Conservation Area*
Land Protected	1,900,000 acres	857,603 acres	434,354 acres
Management Objectives	"To assure that the Bears Ears area will be managed forever with the greatest environmental sensitivity and healing of the land to make it fully a place where we can be among our ancestors and their songs and wisdom and our deepest values, where the traumas of the past can be alleviated, where we can connect with the land and be healed; To make this National Monument the most deeply and truly "Native" of all federal public land units by honoring the historical and contemporary relationship between Native Americans and the natural world of Bears Ears; To protect and preserve, for future generations of all Americans, the natural features, beauty, and inspiration found in the extraordinary Bears Ears landscape; To bring to light, through research, public outreach, and actual practice, the many aspects and values of Indigenous Traditional Knowledge in its fullest sense as a philosophy, a cultural tradition, and a useful tool for enriching modern land management."	Protect, conserve, and enhance unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources; maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public; recognize and maintain historic uses; provide for traditional access by indigenous persons for culturally significant subsistence, including but not limited to traditional gathering, wood cutting, hunting, and cultural and religious uses; protects and preserves and minimizes disturbance to Native American archaeological sites, including human remains; and Integrate Native American traditional ecological knowledge to improve social, economic, and ecological sustainability.	Protect, conserve, and enhance the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources of the NCA; maintain and enhance cooperative and innovative management practices between resource managers, private landowners, and the public in the NCA; and recognize and maintain historic uses of the NCA.
Management Plan Development	"This key document… would be developed by Monument staff, with the Commission providing specific direction to staff regarding plan design and content, as well as review throughout the process of plan development. Members of the public and other key stakeholders would have ample opportunity to contribute to the development of the plan through normal NEPA processes."	"Prepare management plan in consultation and coordination with local and tribal governments, the public, and the [PLI] Planning and Implementation Advisory Committee." *The NCA includes BLM, USFS, and NPS managed lands – it is unclear whether the Department of the Interior and the Department of Agriculture will need to create separate plans or coordinate planning.* "In preparing the management plan . . ., the Secretary of the Interior shall create a Commission consisting of one representative from each Tribe or Pueblo that enters into cooperating agency status. . . . The Secretary shall actively seek advice and carefully and fully consider the views of the Commission." *It is unclear if this commission would have a role in planning for USFS lands. It is also unclear whether this Commission would have a role in planning, as "cooperating agency" status applies to NEPA analysis of planning proposals rather than planning.* The [PLI] Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests.	"The relevant Secretary shall prepare the management plan in consultation and coordination with local and tribal governments, the public, and the [PLI] Planning and Implementation Advisory Committee." *The NCA includes BLM, USFS, and NPS managed lands – it is unclear whether the Department of the Interior and the Department of Agriculture will need to create separate plans or coordinate planning.* The Public Lands Initiative Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests. Members are appointed jointly by the Secretaries of Agriculture and the Interior.
Management Plan Administration	The Inter-Tribal Coalition proposes the creation of an 8-member council, comprised of the 5 tribes alongside the USFS, NPS, and BLM. The Council has hiring authority over the Monument Manager and creates all monument policy. "The Agencies and the Tribes shall, from the beginning to the conclusion of all plans and projects, collaborate jointly on all procedures, decisions, and other activities except as otherwise provided in the Proclamation. In the case of impasse, undue delay, or other extraordinary circumstances, the Agencies and the Tribes shall proceed to appropriate mediation. If such mediation fails, the Secretary of Interior or the Secretary of Agriculture, as appropriate, shall in a written opinion explaining the reasons, make the relevant decisions."	Creates a 10-person "Bears Ears Advisory Committee" to advise the Secretary regarding on management plan implementation and administration. The Committee would include an expert in the Hole-in-the-Rock Trail, a paleontologist, an archeologist or historian, an off-highway vehicle representative, a non-off-highway vehicle representative, a conservationist, a sportsman, a cattle grazer, a member of the San Juan County commission, and a Tribal representative. Creates a [PLI] Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests. Members are appointed jointly by the Secretaries of Agriculture and the Interior.	Creates a [PLI] Planning and Implementation Advisory Committee will include 22 members, 13 of which will represent federal, state and local governments; 9 of which will represent community interests. Members are appointed jointly by the Secretaries of Agriculture and the Interior The Secretary of the Interior is also encouraged to maintain and enhance "cooperative and innovative management practices between resource managers, private landowners, and the public in the Conservation Area."
Mineral Development	"A permanent withdrawal from the mining laws, for both location and leasing, of all lands within the monument."	PLI imposes no new limitations or protections.	Withdrawn from disposal and mineral development under applicable public land laws.

	Bears Ears National Monument	*Bears Ears National Conservation Area*	*Indian Creek National Conservation Area*
Livestock Grazing	"Grazing under existing permits or leases should continue under existing law."	PLI imposes no new limitations or protections.	The number of grazing permits cannot decrease in response to the new designation. "The number of livestock permitted to graze in areas designated by this title shall continue at approximate stocking levels prescribed in the grazing permit that existed on January 1, 2016 and additional or suspended [AUMs] shall be allowed to graze as range conditions allow or if range treatments improve conditions." Existing grazing facilities can be maintained, and new grazing facilities can be constructed.
Water Rights	The proposal protects existing water rights.	PLI imposes no new limitations or protections.	Designation does not create federal reserved water rights. "Nothing in this title…affects any water rights in the State of Utah existing on the date of enactment of this title, including any water rights held by the United States."
Wildlife	"State of Utah and Ute Mountain Ute hunting and fishing laws should continue to apply within the monument."	PLI imposes no new limitations or protections.	"Nothing in this title affects the jurisdiction of the State of Utah with respect to the management of fish and wildlife on Federal land in the State, including the regulation of hunting, fishing, and trapping and use of helicopters to maintain healthy wildlife populations, within the [NCA]."
Native American Uses	"The management plan should, to the maximum extent permitted by law, ensure the protection of Native American sacred and cultural sites in the monument and provide access to the sites by members of Indian tribes for traditional and cultural uses, including gathering of minerals, medicines, berries and other vegetation, forest products, and firewood." "Firewood gathering should continue under current management proscriptions and then be subject to such provisions as adopted in the management plan."	"Provides for traditional access by indigenous persons for culturally significant subsistence, including but not limited to traditional gathering, wood cutting, hunting, and cultural and religious uses within Bears Ears."	Native American uses are not specifically protected within the proposed Indian Creek NCA, but tribes will be consulted with during management plan development.
Vehicle Use	"Motorized vehicle use should be permitted only on designated roads. Non-motorized mechanized vehicle use should be permitted only on roads and trails designated for their use consistent with the purposes of the monument "	PLI imposes no new limitations or protections.	"The use of off-highway vehicles shall be permitted only on designated routes." Those routes cannot "significantly damage designated critical habitat or cultural resources" and cannot "interfere with private property or water rights." OHV use is authorized for maintaining grazing facilities; response to grazing management emergencies; water infrastructure maintenance and development; administrative purposes including emergency response, project construction and maintenance, and fire suppression. Secretary may only temporarily close or permanently reroute routes in consultation with the state and county if there is "significant[ ] damage to designated critical habitat or cultural resources," threat to public safety, or resource damage."
Recreation	Not explicitly addressed, but recreation users are mentioned. "Monument status for Bears Ears will lead to better management of off-road vehicle use and will improve the recreational experience for everyone who visits, including off-roaders."	"Protects, conserves, and enhances the unique and nationally important historic, cultural, scientific, scenic, recreational, archaeological, natural, and educational resources of Bears Ears."	"Authorize, maintain, and enhance the recreational use of the [NCA], including hunting, fishing, camping, hiking, backpacking, cross-country skiing, hang gliding, paragliding, rock climbing, canyoneering, sightseeing, nature study, horseback riding, mountain biking, rafting, off-highway vehicle recreation on designated routes, and other recreational activities."
Land Exchange	The Secretaries would be directed to, upon request of the state of Utah, to negotiate for an exchange of the state inholdings within the monument.	If Utah offers to convey inholdings within the PLI area to the federal government, the federal government *shall* accept the offer and convey to the state all right, title, and interest in the land. The exchange would be subject to streamlined NEPA review.	If Utah offers to convey inholdings within the PLI area to the federal government, the federal government *shall* accept the offer and convey to the state all right, title, and interest in the land. The exchange would be subject to streamlined NEPA review.

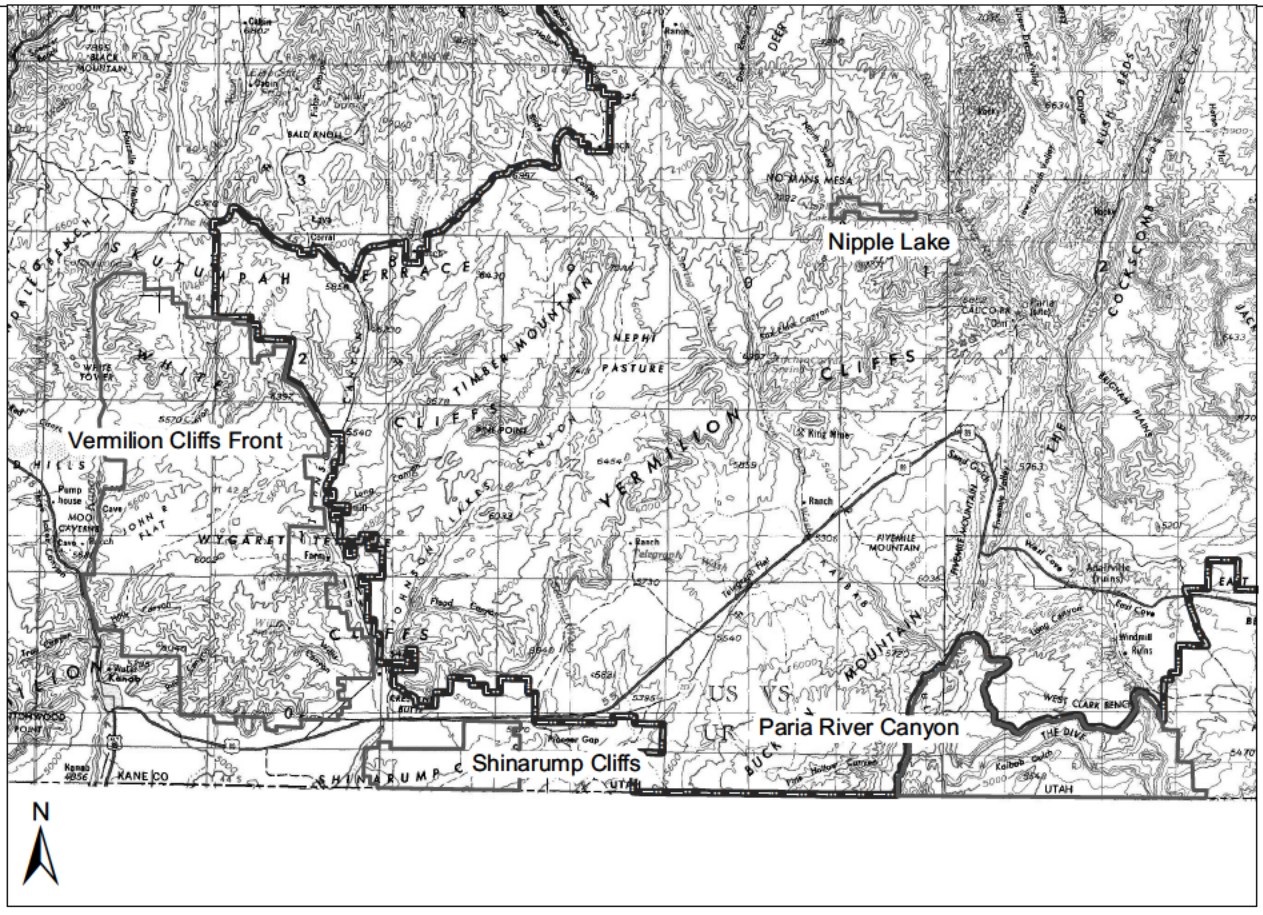
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The authors would like to thank Zach Williams, S.J. Quinney College of Law class of 2016, for his assistance researching NCAs.

[1] Utah Ass'n of Counties, 2015 Utah Counties Fact Book 37 (2015).
[2] *Id*.
[3] H.R. 5780, 114th Cong. 2d Sess. (2016) (*hereinafter* PLI).
[4] Acreage figures are approximations only, as it appears that NCA and National Monument acreages were calculated using differing assumptions.
[5] 54 U.S.C. §§ 320101-303 (2014 supp. II).
[6] *See* Collins & Green, *A Proposal to Modernize the American Antiquities Act*, 202 SCIENCE 1055 (1978).
[7] Congress may also enact legislation creating new National Monuments. When Congress designates a new National Monument, its power to ascribe management requirements and include other protective designations is limited only by the Constitution. When Presidents designate a new National Monument they are limited to the authority delegated to them by Congress.
[8] 54 U.S.C. §§ 320310(a) and (b) (2014 supp. II).
[9] *See e.g*. Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006).
[10] Pres. Proc. No. 9194, Establishment of the San Gabriel Mountains National Monument, 79 Fed. Reg. 62303 (October 10, 2014).
[11] *See e.g*., *id*.
[12] Cameron v. U.S., 252 U.S. 450 (1920) (Grand Canyon); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945) (Jackson Hole); Cappaert v. U.S., 426 U.S. 128 (1976) (Devils Hole); Tulare Cty. v. Bush, 185 F. Supp. 2d 18, 27 & n.2 (D.D.C. 2001), aff'd, 306 F.3d 1138 (D.C. Cir. 2002) (Giant Sequoia); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006) (Grand Staircase-Escalante); and Anaconda Copper Co. v. Andrus, 1980 U.S. Dist. LEXIS 17861; Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978) (several Alaskan national monuments).
[13] 54 U.S.C. § 320301(b) (2014 supp. II).
[14] Cappaert v. U.S., 426 U.S. 128 (1976) (Devil's Hole); Cameron v. U.S., 252 U.S. 450 (1920); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945).
[15] Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1183-85 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006). *See also*, Tulare County v. Bush, 185 F.Supp.2d 18, 24 (D. D.C. 2001) ("The Antiquities Act sets forth no means for reviewing a President's proclamation other than specifying that a President has discretion in his or her use of the Act."), *affirmed* 306 F.3d 1138 (D.C. Cir. 2002).
[16] Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1137 (D.C. Cir. 2002).
[17] Cameron v. U.S., 252 U.S. 450 (1920); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1192-93 (D. Utah 2004), appeal dismissed for lack of standing, 455 F.3d 1094 (10th Cir. 2006). *See also*, Tulare County v. Bush, 306 F.3d 1138, 1141-42 (D.C. Cir. 2002).
[18] Pres. Proc. No. 9297, Establishment of the Basin and Range National Monument, 80 Fed. Reg. 41969 (July 10, 2015).
[19] Pres. Proc. No. 9232, Establishment of the Browns Canyon National Monument, 90 Fed. Reg. 9975 (Feb. 24, 2015).

[20] Pres. Proc. No. 8946, Establishment of the Río Grande del Norte National Monument, 78 Fed. Reg. 18783 (March 25, 2013).
[21] Basin and Range Proc., *supra* note 18.
[22] Pres. Proc. No. 9298, Establishment of the Berryessa Snow Mountain National Monument, 80 Fed. Reg. 41975 (July 10, 2015).
[23] 42 U.S.C. § 1996 (2012), *but see* U.S. v. Mitchell, 502 F.3d 931 (9th Cir. 2007).
[24] Pres. Proc. No. 9476, Establishment of the Katahdin Woods and Waters National Monument, 81 Fed. Reg. 59121 (Aug. 24, 2016). *See also*, Pres. Proc. No. 9396, Establishment of the Sand to Snow National Monument, 81 Fed. Reg. 8379 (Feb. 12, 2016); Pres. Proc. No. 9395, Establishment of the Mojave Trails National Monument, 81 Fed. Reg. 8371 (Feb. 12, 2016); Pres. Proc. No. 9394, Establishment of the Castle Mountains National Monument, 81 Fed. Reg. 8365 (Feb. 12, 2016); Berryessa Snow Mountain Proc., *supra* note 22; Basin and Range Proc., *supra* note 18; Browns Canyon Proc., *supra* note 19; Pres. Proc. No. 9131, Establishment of the Organ Mountains-Desert Peaks National Monument, 79 Fed. Reg. 30431 (May 21, 2014); and Pres. Proc. No. 8947, Establishment of the San Juan Islands National Monument 78 Fed. Reg. 18789 (March 25, 2013) (all containing identical substantive language).
[25] San Gabriel Mountains Proc., *supra* note 10.
[26] Río Grande Del Norte Proc., *supra* note 20.
[27] Pres. Proc. No. 8868, Establishment of the Chimney Rock National Monument, 77 Fed. Reg. 59275 (Sept. 21, 2012).
[28] Beaver Dam Wash NCA, Pub. L. No 111-11 (2009).
[29] *See e.g.*, Dominguez Escalante NCA, Pub. L. No 111-11 (2009) (adding protection of riparian and wilderness values).
[30] Kings Range NCA, Pub. L. No. 91-476 (1970).
[31] Dominguez Escalante NCA, Pub. L. No 111-11 (2009).
[32] *See e.g.*, Kings Range NCA, Pub. L. No. 91-476 (1970).
[33] *See e.g.*, El Malpais NCA, Pub. L. No. 100-225 (1987), and Gila Box Riparian NCA, Pub. L. No. 101-628 (1990).
[34] *See e.g.*, Gunnison Gorge NCA, Pub. L. No 106-76 (1999), and Colorado Canyons NCA, Pub. L. No. 106-353 (2000).
[35] Beaver Dam Wash NCA, *supra* note 28, and Red Cliffs NCA, Pub. L. No 111-11 (2009).
[36] Red Cliffs NCA, *supra* note 35.
[37] Beaver Dam Wash NCA, *supra* note 28.
[38] El Malpais NCA, Pub. L. No 100-225 (1987).
[39] *Id*.
[40] *See e.g.*, San Pedro Riparian NCA, Pub. L. No 100-696 (1988), and Gila Box Riparian NCA, *supra* note 33.
[41] Beaver Dam Wash NCA, *supra* note 28, Red Cliffs NCA, *supra* note 35.
[42] The Bears Ears Inter-Tribal Coalition, Proposal to President Barack Obama for the Creation of Bears Ears National Monument (Oct. 15, 2015) (hereinafter "Inter-Tribal Proposal") http://utahdinebikeyah.org//wp-content/documents/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf.
[43] The Bears Ears Inter-Tribal Coalition, Tribes Uniting to Protect Bears Ears (last visited July 13, 2016) http://www.bearsearscoalition.org/about-the-coalition/tribal-statements-of-support/.
[44] Inter-Tribal proposal, *supra* note 42 at 30-31.
[45] *Id*. at 22.
[46] *See e.g.*, 43 U.S.C. § 1712(c)(9) (2012) (land use plan consistency under the Federal Land Policy and Management Act), and 40 C.F.R. § 1501.6 (2015) (cooperating agency status under the National Environmental Policy Act).
[47] The Inter-Tribal proposal also states that "All existing mineral rights should be honored, but future mining should be prohibited in Bears Ears." *Id*. at 35.

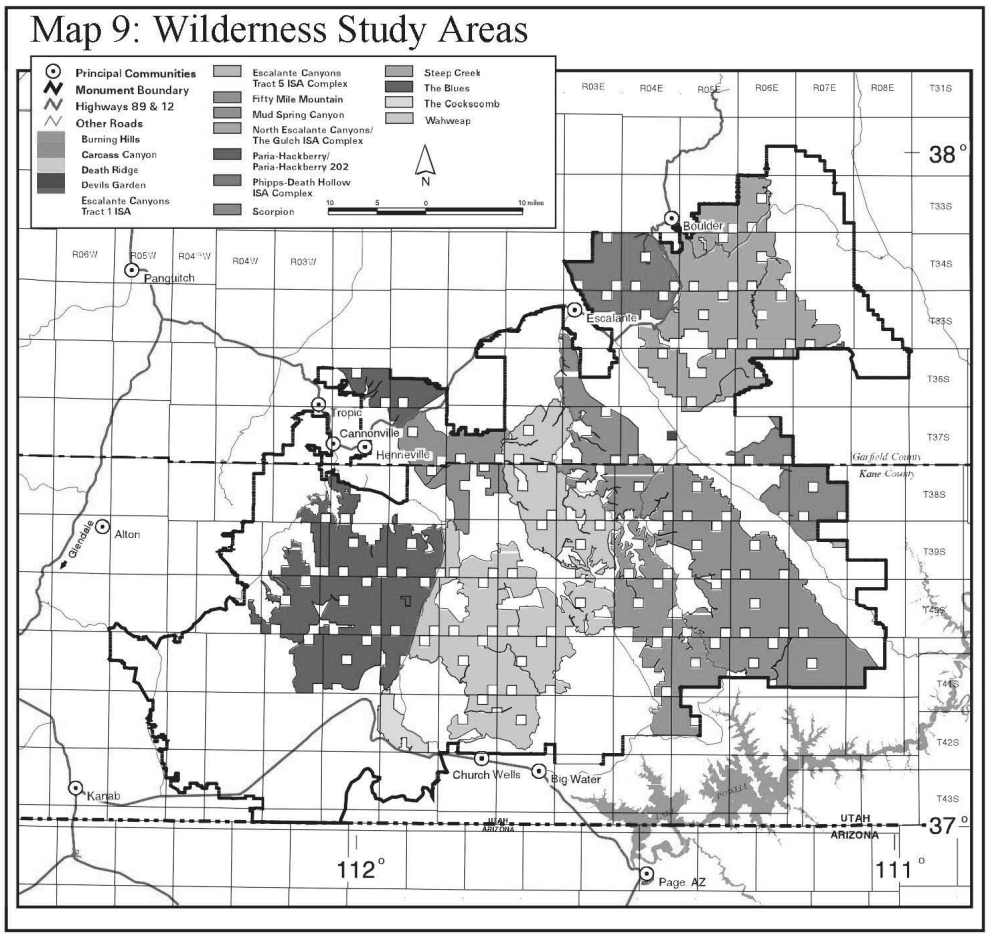
[48] SITLA, Monument Designations May Impact Utah Education Funding, https://trustlands.utah.gov/monument-designations-may-impact-utah-education-funding/ (last visited Aug. 10, 2016).
[49] Inter-Tribal proposal, *supra* note 42 at 36.
[50] *Id*. at 36-37.
[51] PLI, *supra* note 3, at 118:14-21.
[52] *Id*. at 122:16—123:14.
[53] 16 U.S.C. § 1131(c) (2012).
[54] PLI, *supra* note 3, at 21:21—22:4.
[55] *Id*. at 18:9-120.
[56] 43 U.S.C. § 1782(c) (2012).
[57] Bureau of Land Management, Dep't of the Interior, Monticello Field Office Record of Decision and Approved Resource Management Plan, Map 8 (2008).
[58] PLI, *supra* note 3, at 100:22-25.
[59] *Id*. at 206:14—207:25. The U.S. Forest Service is part of the Department of Agriculture. It is unclear whether Forest Service planning requirements are intended to apply to either the BLM or the National Park Service, both of which are in the Department of the Interior, which would also manage lands within the proposed NCA.
[60] PLI, *supra* note 3 at 31:1-20, and 208:1-20.
[61] *Id*. at 31:7-12, and 208:7-12.
[62] *Id*. at 209:1-16. Note that Department of the Interior regulations stipulate that under the National Environmental Policy Act, management plans require a full environmental impact statement and cannot be authorized in a less detailed environmental assessment. 43 C.F.R. § 1601.0-6 (2015).
[63] *Id*.
[64] PLI, *supra* note 3, at 210:10-20.
[65] *Id*. at 212:6—213:4.
[66] *Id*. at 198:8-11.
[67] *Id*. at 166:19—201:6.
[68] *Id*. at 201:8-21.
[69] *Id*. at 30:8—31:20.
[70] *Id*. at 33:8:18.
[71] *Id*. at 36:15—37:6, and 35:24—36:5 (wildlife).
[72] *Id*. at 31:22—32:32:8.
[73] *Id*. at 38:13:20.
[74] The Bears Ears Tribal Commission would include one representative from each interested Tribe and Pueblo that traces their culture and heritage to the lands within the Bears Ears NCA. While the Bears Ears National Monument proposal is being put forth by five tribes and supported by an additional twenty-six tribal governments, conservative estimates put Commission membership at between eleven and thirteen.



Data Call, GSENM, 5/19/2017

Scale: 1:308,160

FOIA001:01708404



DOI-2019-06 02319

Grand Staircase-Escalante National Monument Response
DOI Info Req. on FACA and NON-FACA related advisory bodies

- The Grand Staircase-Escalante National Monument Management Plan (MMP), signed by the Secretary of the Interior in November 1999 and effective February 2000, directed that a Monument Advisory Committee (MAC), chartered under the Federal Advisory Committee Act, be established to advise and aid Monument managers on science issues and the achievement of Management Plan objectives.

- As specified in the Committee charter, the GSENMAC may be requested to: (1) Gather and analyze information, conduct studies and field examinations, seek public input or ascertain facts to develop recommendations concerning the use and management of the Monument; (2) review programmatic documents including the annual Monument Manager's Reports, and Monument Science Plans to provide recommendations on the achievement of the Management Plan objectives; (3) Compile monitoring data and assess and advise the DFO of the extent to which the Plan objectives are being met; (4) Make recommendations on Monument protocols and applicable planning projects to achieve the overall objectives are being met; (5) Review appropriate research proposals and make recommendations on project necessity and validity; (6) Make recommendations regarding allocation of research funds through review of research and project proposals as well as needs identified through the evaluation process; (7) Consult and make recommendations on issues such as protocols for specific projects, e.g., vegetation restoration methods or standards for excavation and curation of artifacts and objects; and/or (8) Prepare an annual report summarizing the Committee's activities and accomplishments of the past year, and make recommendations for future needs and activities.

- The 15-member MAC is comprised of one representative from each of the following categories: An elected official from Garfield County, an elected official from Kane County, State of Utah, Tribal, Livestock permittees, Outfitter-Guide permittees, Education, and Environmental; and one scientist representing the fields of Archaeology, Botany, Geology, Paleontology, Social Science, Systems Ecology and Wildlife Biology. Of the positions currently filled, six are from southern Utah (Kane & Garfield Counties), three from central/northern Utah, one from northern Arizona, and two from Colorado. There are currently three vacancies – Botany, Social Science, and an elected official from Garfield County.

- Among the recommendations prepared by the MAC are a comprehensive report on using Adaptive Management Strategies in Science, a Livestock Grazing report, and numerous recommendations ranging from manning strategies for Monument visitor centers to gaining Dark Sky recognition for the Monument.

- By charter, the MAC meets two-to-four times per year; and is currently meeting four times to advise Monument management on the development of the on-going Livestock Grazing Management Monument Management Plan Amendment and Associated Environmental Impact Statement, as well as other projects in process including the 19,000-acre Skutumpah Terrace Restoration Project. The next meeting is scheduled for October 4/5, 2017 in Escalante, Utah. It has not been noticed in the Federal Register Notice.

New information requested on Executive Order on the Review of Designations Under the Antiquities Act

BLM-Utah Responses to Additional Questions

1) Designated wilderness areas (name, acreage), Wilderness Study Areas (name if there is one, acreage, type), and/or areas managed to preserve wilderness or roadless characteristics that are not WSAs.

a) There is no designated wilderness within GSENM.

b) There are 16 Wilderness Study Areas totaling 881,997 acres within GSENM.
- Phipps-Death Hollow Instant Study Area (ISA) - 42,731 acres
- Steep Creek Wilderness Study Area (WSA) - 21,896 acres
- North Escalante Canyons/The Gulch ISA - 120,204 acres
- Carcass Canyon WSA - 47,351 acres
- Scorpion WSA - 35,884 acres
- Escalante Canyons Tract 1 ISA - 360 acres
- Escalante Canyons Tract 5 ISA - 760 acres
- Devils Garden ISA - 638 acres
- The Blues WSA - 19,030 acres
- Fiftymile Mountain WSA - 148,802 acres
- Death Ridge WSA - 63,667 acres
- Burning Hills WSA - 61,550 acres
- Mud Spring Canyon WSA - 38,075 acres
- The Cockscomb WSA - 10,827 acres
- Paria/Hackberry and Paria/Hackberry 202 WSA - 135,822 acres
- Wahweap WSA - 134,400 acres
    - *WSA/ISA acres listed are the total BLM-administered surface acres from the Utah Statewide Wilderness Study Report, October 1991. GIS calculations would vary.*

c) The most recent comprehensive inventory of lands with wilderness characteristics within GSENM is Utah's statewide inventory effort in 1999. Within GSENM there are approximately 471,700 acres of lands with wilderness characteristics. GSENM completed a Monument Management Plan in 2000, but did not make specific land use planning decisions regarding the management of lands with wilderness characteristics. Instead, the MMP designates lands within the GSENM in different "Management Zones", to help define permitted or excluded activities and any stipulations pertaining to them. There are four types of Management Zones in GSENM: Frontcountry, Passage, Outback and Primitive. Lands with wilderness characteristics that are within the Outback or Primitive zones are managed according to goals and objectives that more closely align with protection of wilderness characteristics

See attached maps: GSENM_PassageZone_LWC_WSA.pdf; GSENM_OutbackZone_LWC_WSA.pdf; GSENM_FrontcountryZone_LWC_WSA.pdf; GSENM_PrimitiveZone_LWC_WSA.pdf and GSENM_FEIS_WSAmap.jpeg.

2) Outstanding R.S. 2477 claims within a monument type of road claimed and history

a) There are ~1,525 roads claimed in Garfield and Kane counties under R.S. 2477. This figure also includes lands outside of GSENM managed by the Kanab Field Office. *(See: Statewide_RS2477_Claims_102313.pdf; Utah_RS2477Claims.pdf and Snapshot_GSENMRS2477Claims.jpg)*. Between 2005 and 2012, the State of Utah and 22 counties filed 30 lawsuits seeking quiet title to over 12,000 claimed R.S. 2477 rights-of-way. The vast majority of these claims are on BLM-administered lands, but claims are pending on lands administered by the National Park Service and U.S. Forest Service. To date, only one case, involving three roads, has been settled (Juab 1). Under a case management order, six cases involving 1,500 claims statewide are currently being litigated Kane (1), Kane (2), (3), and (4), and Garfield (1) and (2). Of the 1,500 claims, approximately half are located in Grand Staircase Escalante National Monument. The remaining cases have been stayed, although preservation depositions have been allowed to continue. BLM-Utah maintains thousands of records related to R.S. 2477 claims and active or pending litigation, but some of the information is attorney-client privileged. Please clarify if additional information is needed.

3) Maps

GSENM provided multiple maps in the initial data response *(2.g.1_GSENM_SiteDensity.pdf; 2.g.2_GSENM_Inventories.pdf; 2.g.3_GSENM_ArchSites.pdf; 2.g.4_GSENM_ArchNumofSites.pdf; 2.b.Upper Valley Field Map.pdf; GSENM Background Info subfolder- GSENM_Brochure_Map.pdf; MAP_WSA_for MMP DEIS Map.pdf; GrandStaircaseEscalante_map.pdf; Paleo_CulturalSitesMap5-8-17.pdf; PaleoSitesMap5-8-17.pdf)*. There are also numerous maps contained within the Monument Management Plan. We are attaching the *GSENM ManagementZones_Transportation Map.pdf*. Please advise if specific additional maps are needed.

4) Cultural or historical resources, particularly Tribal, located near a monument but not within the boundary that might benefit from inclusion in the monument

- Nipple Lake: Private inholding within GSENM. Landowner in the past has expressed interest in selling this property. This is considered a Traditional Cultural Property (TCP) by the Kaibab Paiute, in conjunction with the nearby Mollies Nipple land form (a prominent, isolated rocky peak), known to the Kaibab Paiute as "Mountain that Breathes. It is the only permanently wet meadow within GSENM, providing for a very unique habitat. The area is very dense in cultural sites, early ancestral pueblo occupation, and pilgrimage trails.
- Vermilion Cliffs Front: Kanab Field Office (KFO) and private land near the Kanab Creek boundary. Ancestral pueblo/archaeological record; site is contiguous with GSENM;

includes important Ancestral Puebloan (Anasazi) sites, including the earliest studied and reported in the area

- Paria River Canyon (between Vermilion Cliffs NM & GSENM; managed by KFO) - Includes pilgrimage trails for Hopi & Paiute. Archaeological sites in this area contain evidence of continued Hopi pilgrimage use long after abandonment by the Ancestral Puebloans (Anasazi). (Note: This is also the location of Buckskin Gulch, one of the longest continuous slot canyons in the world, and the famous "Wave" formation).
- Shinarump Cliffs: KFO & private inholdings: Very dense array of Ancestral Puebloan (Anasazi) sites, including the earliest dated pottery in the area. The archaeological record here is equal to that at Grand Gulch.

(See: *GSENM Data_call_CulturalOutsideGSENM.pdf* and *Stoffle et al 2001 Kaibab Paiute Ethnographic Assessment in GSENM.pdf*)

5) Other general questions or comments

a) **Discuss the full range of Proclamation objects.** The initial DOI data call focuses almost exclusively on cultural objects, but the Proclamation identifies many objects of antiquity or historical or scientific interest to be protected. GSENM published a table of all resources and objects in the Analysis of the Management Situation for the Livestock Grazing Plan Amendment EIS (*GSENM_AMS_Final_July2015.pdf*, starting on pg.136). Objects within GSENM include geologic stratigraphy and structures, paleontological sites, cultural use, human history and biological resources. Each annual Manager's Report also notes the status and trend of the identified objects. We included the 2014, 2015, and 2016 Manager's Report in the GSENM Background Info subfolder in Drive. The Science Symposium subfolder in Drive also summarizes some of the scientific studies on GSENM. The paleontological resources on GSENM are particularly noteworthy and world class. See attached: *Paleontology on the GSENM Titus.docx and GSENM Fossil Map.pdf*.

b) **Extent of the designation:** The GSENM designation was the subject of litigation. The case concerned the designation of 1.7 million acres of federal land as a national monument pursuant to the Antiquities Act. The court held that the President complied with the Antiquities Act by (1) designating, in his discretion, objects of scientific or historic value, and (2) setting aside, in his discretion, the smallest area necessary to protect the objects. (*See: Utah Ass'n of Counties v. Bush.pdf and 2004-04-19 Opinion & Order.pdf*)

In order to project the objects identified in the Proclamation, the Department must consider the connectivity between them. This concept is particularly critical for biological resources, but also applies to management of cultural resources and tribal interests. Protection of isolated identified cultural sites is not synonymous with protection of a cultural landscape (e.g., Traditional Cultural Properties, vision quest sites, etc.) The Secretary memo to the President articulates the rationale for the

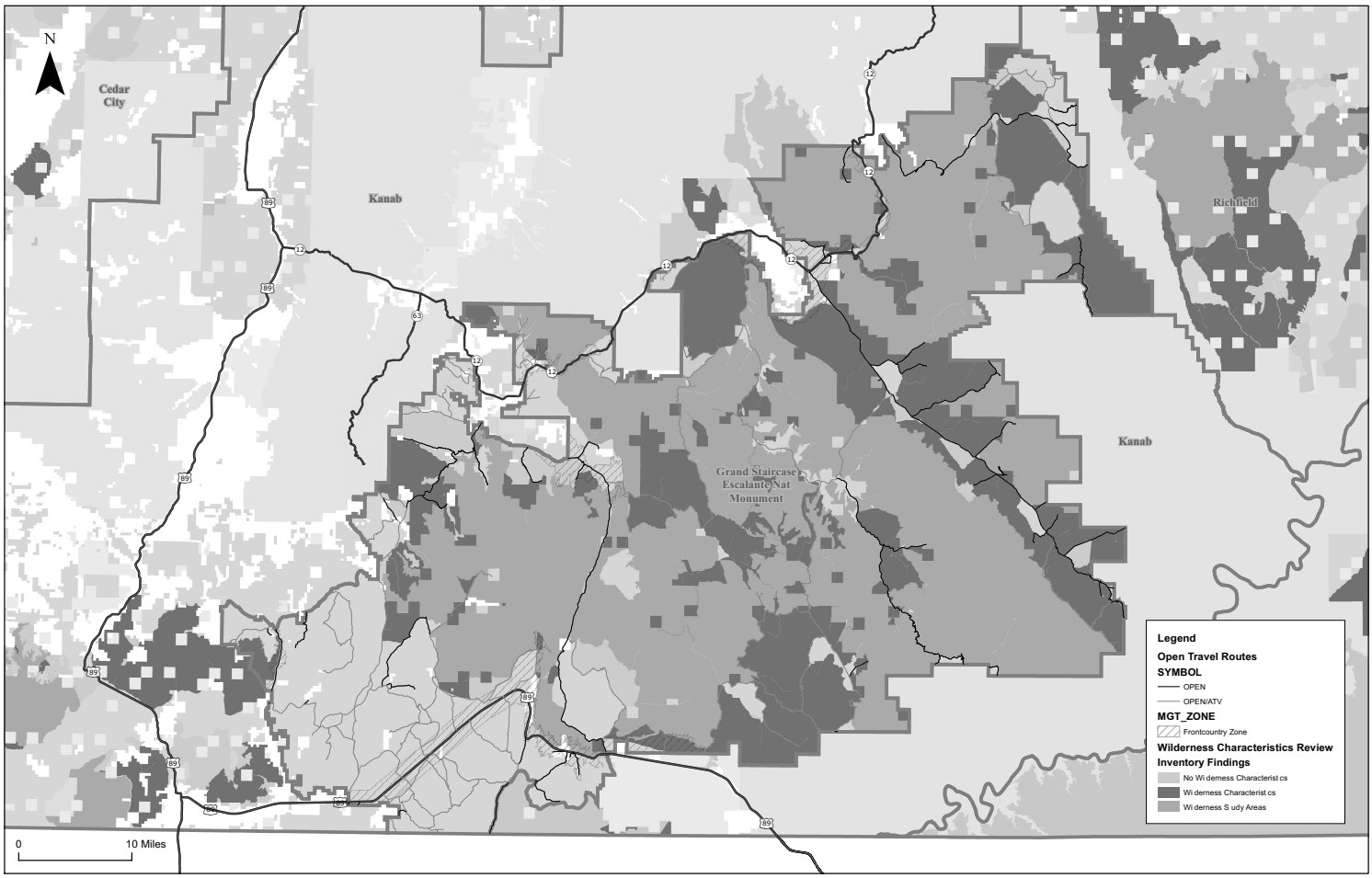
GSENM boundaries based on these factors and considerations. (*See: 7.2_ 8-15-96_Secretarial Memo.pdf in Drive*)

c) **Monument Advisory Committees (MACs)**. MACs provide for local and subject matter expert input and advice into management objectives. The GSENM MAC includes seven scientist positions that focus on the identified objects in the Proclamation. (*See: May 11, 2017 DOI MAC Data Call.docx*). For those Monuments that do not have MACs, the RACs provide that same level of integrating multiple stakeholders in an advisory capacity.

d) **Protection under the Antiquities Act versus other statutory laws or an NCA designation:** BLM-Utah requests that WO 410 assist in crafting clear language that describes the various levels of protection afforded under the Archeological Resources Protection Act, Paleontological Resources Protection Act, Native American Graves Protection and Repatriation Act, etc. versus the Antiquities Act. For example, there are no statutory protections for cultural landscapes, but such resources could be protected under the Antiquities Act. See also the *Stegner Center_NM vs NCA.pdf*.

GSENM asserts that the designation of GSENM as a national monument elevates protection of the identified objects in many ways, including:

- Increased attention and public awareness of resources and objects
- Expanded educational/research efforts by employees and researchers related to these objects
- Increased partnership opportunities and funding via Universities that focus on research in Monuments


N
Cedar City
Kanab
Richfield
Kanab
Grand Staircase Escalante Nat Monument
0
10 Miles
Legend
Open Travel Routes
SYMBOL
OPEN
OPEN/ATV
MGT_ZONE
Frontcountry Zone
Wilderness Characteristics Review Inventory Findings
No Wi derness Characterist cs
Wi derness Characterist cs
Wi derness S udy Areas